Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

C.W., By Her Guardian Ad Litem,
Loralyn McKinley, Esquire, Petitioner,

v.

Dolores Wasiek, Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a State have a compelling interest in authorizing the sterilization of an adult with lifelong incapacity, and thus overriding her Fourteenth Amendment rights of bodily integrity and reproductive autonomy, when the individual is in no immediate danger of pregnancy and when there is no judicial finding that sterilization is the least restrictive alternative?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Lorrie McKinley, Esquire, Guardian Ad Litem for C.W., Petitioner,

v.

Dolores Wasiek, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Lorrie McKinley, Esquire, Guardian Ad Litem for C.W., respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania.

OPINIONS BELOW

The en banc opinion of the Superior Court of Pennsylvania (App. at 3, infra),[1] is reported at 640 A.2d 427. The

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1 The Appendix is designated herein as "App. at ___."

panel opinion of the Superior Court of Pennsylvania is reported at 1993 Pa. Super. LEXIS 85 (App. at 100, infra). The en banc opinion of the Orphans' Court Division of the Court of Common Pleas of Philadelphia County, Pennsylvania (App. at 202, infra), is not reported. The opinion of the Orphans' Court Division of the Court of Common Pleas of Philadelphia County, Pennsylvania (App. at 227, infra) is reported at 10 Fid.2d 79.

JURISDICTION

The Supreme Court of Pennsylvania declined to review the judgment of the Superior Court of Pennsylvania on August 17, 1994 (App. at 1, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution, U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This petition arises out of litigation initiated by Respondent, Delores Wasiek, seeking authority to surgically sterilize her daughter, C.W. C.W. is a woman with mental retardation who has never been capable of consenting to the procedure. Petitioner, C.W.'s court-appointed guardian ad litem, opposes the request

because the State has no compelling interest in authorizing the sterilization of a person not facing an imminent risk of pregnancy and because sterilization is not the "least restrictive" means of contraception for C.W. She contends that sterilization thus violates C.W.'s Fourteenth Amendment rights to bodily integrity and reproductive autonomy.

A. C.W.

C.W. is a twenty-six year old woman who has moderately severe retardation. She also has grand mal epilepsy and cerebral palsy. C.W. is mute and communicates in sign language and through noises that can be interpreted by those who know her.

C.W. has resided in a Community Living Arrangement ("CLA") since she was twelve years old. The CLA is highly structured and, because C.W. has a serious and

unpredictable seizure condition, she receives more intensive supervision than the other residents. Since 1990, C.W. has resided in a CLA with only female residents and staff. She is never permitted outside the CLA without a staff escort and she has never eloped.[2] C.W.'s room has a monitor that enables the CLA staff to be aware of any sounds coming from within. C.W. spends every other weekend in the custody of her parents, who also ensure that C.W. is not left alone.[3]

There is no evidence that C.W. has ever engaged in sexual activity with another person. She is not capable of consenting to a sexual relationship and could only become pregnant if she were

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2 Trial Transcript, hereafter "Tr." at 205 and 332.

3 Tr. at 76-77.

victimized. Pregnancy would not be medically advisable for C.W. However, because of the intense supervision she receives, the likelihood of C.W. being victimized and thereby becoming pregnant is slight.[4]

To date, a program of education, supervision, and training have successfully protected C.W. from sexual victimization and pregnancy. No changes are planned for C.W. that would limit the program's effectiveness.[5] Moreover, hormonal contraceptives, like birth control pills, have not been tried, and

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4 Tr. at 250, 292-3, Tr. 8/17/89 at 65.

5 Tr. at 75, 293.

there is no medical proof that they would be inappropriate for C.W.[6]

B. Proceedings Below And Presentation Of The Federal Question

This litigation began when respondent petitioned the Orphans' Court of Philadelphia County for appointment as C.W.'s guardian with specific authority to consent to a tubal ligation to sterilize her. Petitioner, as C.W.'s court-appointed guardian ad litem, has argued that surgical sterilization implicates C.W.'s Fourteenth Amendment rights of bodily integrity and reproductive autonomy. At every juncture, Petitioner has challenged the appropriateness of sterilization because C.W. is in no immediate danger of pregnancy and because sterilization is not

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6 Tr. at 113-114, 231, 253-4, Tr. 8/17/89 at 67, 75; Guardian's Exhibit 11.

the least invasive means for preventing C.W. from becoming pregnant. This dispute has divided every appellate court to consider it.

Petitioner first raised the federal question in the trial court by arguing that sterilization implicates C.W.'s Fourteenth Amendment rights, that those rights were not diminished by her incapacity, and that the State, acting through the court, could not authorize sterilization absent a compelling justification. She contended that since C.W. is not sexually active and lives in a very protective environment, sterilization is unnecessary. Moreover, Petitioner argued, where non-invasive means for preventing

pregnancy like birth control pills[7] could be used, surgical alternatives would unduly infringe upon C.W.'s Fourteenth Amendment rights. App. at 317 **et seq.**

The trial court did not address C.W.'s constitutional right to bodily integrity, identified no compelling reason why sterilization was required, and made no effort to base its opinion upon the least restrictive alternative. Indeed, the trial court acknowledged the remoteness of the risk of pregnancy, Tr. at 660, and dismissed C.W.'s constitutional right to reproductive autonomy as "illusory." App. at 315. It concluded that C.W.'s best interests would be served by "maximum"

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7 Those supervising the CLA where C.W. lives already see that she takes seizure medications at least daily. They could easily include birth control pills in her existing regimen.

pregnancy prevention, whether or not least restrictive. App. at 295. Based on this conclusion, the trial court appointed Respondent as C.W.'s guardian with specific authority to consent to a tubal ligation. Petitioner appealed to the Orphan's Court en banc,[8] which affirmed without discussing C.W.'s Fourteenth Amendment rights. Judge Louis Bruno, in his dissenting opinion, made the first judicial reference to the Fourteenth Amendment issues:

> This woman's constitutional rights to privacy and bodily integrity are being totally trampled upon because the hearing judge and my colleagues are focusing on the easiest method of pregnancy prevention rather than the protection of the physical person of this woman. . . . [I]t is absolutely not necessary to take the most extreme measure possible when it has not been

8 See App. at 330 for Petitioner's treatment of the federal question.

shown that other, more reasonable measures are unworkable. . . .

App. at 222.

Petitioner appealed to the Pennsylvania Superior Court, and a three-judge panel reversed by a vote of two-to-one. [9] The majority adopted Petitioner's argument:

> The Supreme Court of the United States has recognized a fundamental constitutional right to privacy, which encompasses an individual's right to make autonomous decisions regarding procreation (citations omitted). The Supreme Court has also held that an individual's fundamental right to privacy cannot be diminished due to that person's incompetence. Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 110 S.Ct. 2481, 111 L.Ed. 224 (1990). Since a fundamental right is implicated in the decision to impose sterilization upon an individual, the state must demonstrate a compelling state interest before it may constitutionally deprive an individual of that

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9 Petitioner's articulation of the federal question and argument in support thereof is contained in the Appendix at 341.

> right. See, e.g., Eisenstadt v. Baird, at 448, 92 S.Ct. at 1035, 31 L.Ed.2d at 359. If a less restrictive alternative is available that can achieve the same stated goal without depriving an individual of a fundamental right, it must be utilized (citations omitted).
>
> Based on these sound constitutional principles, and a long history of eugenic sterilization of the mentally retarded in the United States, courts in other jurisdictions, as well as our own, have held that sterilization of mentally retarded individuals implicates a fundamental right and requires that we impose the least restrictive alternative in seeking contraceptive measures for those individuals (citations omitted).

App. at 110.

> [W]e are constrained to conclude that tubal ligation has not been established as the least restrictive nor as the only practicable means of contraception available to C.W. Therefore, we conclude that the order of the trial court violates C.W.'s fundamental rights to privacy and bodily integrity.

App. at 115.

On reargument before the Superior Court En Banc, the court reversed itself

by a vote of 6-3 and reinstated the trial court's order.[10] The majority provided no analysis of the constitutional claim. Instead, it focused upon C.W.'s medical condition, and concluded that sterilization was in C.W.'s "best interest" and "not overly intrusive." App. at 63. The majority acknowledged that less restrictive alternatives had to be considered as part of the analysis, App. at 10, but utilized it only as one of several factors in determining C.W.'s "best interest." The majority made no finding that sterilization was the least restrictive alternative. Reiterating the panel majority's Fourteenth Amendment analysis, the three dissenting judges criticized the majority for "not

10 Petitioner resubmitted her Superior Court brief on reargument.

adequately address[ing] C.W.'s constitutional right to privacy, including the rights to bodily integrity and reproductive autonomy." App. at 73, et seq.

Petitioner sought discretionary review by the Pennsylvania Supreme Court. Review was denied on August 17, 1994. App. at 1.

REASONS FOR GRANTING THE PETITION

A. Involuntary Sterilization Implicates Fundamental Federal Constitutional Rights.

This case presents this Court with its first opportunity since 1927 to define the circumstances under which a woman with a life-long disability may be required to undergo compulsory surgical sterilization. In Buck v. Bell, 274 U.S. 200 (1927), this Court held that a State could surgically sterilize an involuntarily institutionalized eighteen-year-old woman, stating

that "three generations of imbeciles are enough." Id. at 207. Since 1927 this Court has stepped away from Buck v. Bell without ever overruling it. The largest single step was Skinner v. Oklahoma, 316 U.S. 535 (1942), in which this Court invalidated a statute permitting the sterilization of convicted felons, recognized that sterilization "touches a sensitive and important area of human rights" (id. at 536), and stressed the dangers inherent in the unchecked power to sterilize:

> Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear.

Id. at 541.

Subsequent to Skinner, this Court has explicitly recognized as fundamental an individual's right of procreative autonomy as part of the right to privacy. Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Carey v. Population Services Int'l, 431 U.S. 678 (1978).

This Court has also held that an individual's incompetence does not diminish or limit privacy rights. Specifically, the right to bodily integrity, i.e., to be free from non-consensual bodily invasion, belongs to competent and incompetent individuals alike. Cruzan v. Missouri Department of Health, 497 U.S. 261 (1990); Youngberg v. Romeo, 457 U.S. 307 (1982).

Where government seeks to limit or restrain fundamental federal constitutional rights, this Court has required them to articulate compelling State interests and to pursue those interests through means which least restrict those rights. Shelton v. Tucker, 364 U.S. 479, 488 (1960). The Court has applied the least restrictive alternative standard to such diverse constitutional rights as free speech, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), Lovell v. Griffin, 303 U.S. 444 (1938), religious exercise, Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981), Sherbert v. Verner, 374 U.S. 398 (1963), and voting rights, Illinois Election Board v. Socialist Workers' Party, 440 U.S. 173 (1979).

The law concerning least restrictive alternatives emerged well after the Court in Buck v. Bell rejected the notion that sterilization of persons with retardation implicated substantive constitutional concerns. Since the issue has not been addressed by the Court since then, it has not had the opportunity to articulate the type of state interests which would justify authorizing sterilization under contemporary constitutional standards, or to decide whether the constitutional rights of people with disabilities are strong enough to shield them from governmentally authorized sterilizations where less invasive means of preventing pregnancy are available.

The issue of whether and to what extent the right to bodily integrity protects a person with mental incapacity from

surgical intrusions has implications extending far beyond the sterilization context. This Court is aware as a result of Cruzan that the difficult task of defining the parameters of the right to bodily integrity for people who are incapacitated has just begun, and that this question is one upon which the Court's guidance is critically needed. In Cruzan, the Court did not confront the circumstance presented here, in which the proposed subject of the surgical intrusion has never been capable of expressing a choice, and it was not called upon to decide whether, in that situation, the least restrictive alternative analysis should apply. This case gives the Court the opportunity to consider how persons who have experienced lifelong incapacity

are to be protected from unwarranted invasions of their bodily integrity.

B. This Court Should Resolve A Conflict Among The States On The Standard For Sterilization Of Persons With Mental Retardation.

Actions seeking the sterilization of individuals with incapacity are typically brought in State courts granted the authority to appoint guardians of the person of individuals. As a result, most of the law on when individuals may be sterilized has been developed by State courts. The failure of this Court either to explicitly overrule Buck v. Bell or to establish a clear standard for limiting the federal constitutional right of bodily integrity has permitted the States to establish a variety of inconsistent standards. As a result, they are difficult to categorize.

At least one State still permits sterilization in the public interest without regard to the interests of the individual, as permitted by Buck v. Bell, supra.[11] Many States have no articulated standard, either statutory or judicial, governing how court petitions for surgical sterilization are to be resolved,[12] and

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11 Mississippi (Miss. Code § 41-45-1 (1972 & Supp. 1991)). Ohio appears to follow suit. See In Re Simpson, 180 N.E. 2d 206 (1962). Guardians in Ohio have unfettered discretion to consent to sterilization on the part of their wards. Non-guardians require a court order. 51 Ohio Revised Code Ann. § 5123.86.

12 The following states have statutes or case law pertaining to the surgical sterilization of people with retardation, but articulate no standard: Delaware (16 Del. Code Ann. § 5703-7); Idaho (Idaho Code § 39-3903); Kentucky (33 Kentucky Revised Stat. Ann. § 387-660); Nevada (Nevada Revised Statutes, Chapter 139); South Carolina (Brode v. Brode, 298 S.E. 2d 443 (S.C. 1982)). Maryland, South Dakota, and Kansas prohibit the sterilization of a person with retardation who

(continued...)

several have no laws compelling judicial intervention at all.[13] Six States permit sterilization of an incompetent individual if sterilization is found to be in the best interests of the individual but do not require that sterilization be the

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12(...continued)
cannot consent to the procedure. Ann. Code of Maryland § 5-605; South Dakota Codified Laws 27A-12-3.20 and 59 Kan. Stat. Ann. § 3018.

13 These states have no statutory or case law standardizing sterilization decisions: Arizona, Illinois, Iowa, Louisiana, Missouri, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Rhode Island, Wyoming, South Dakota, and Texas. Courts in two of these states, Texas and Missouri, have determined that in the absence of a specific statute conferring jurisdiction upon them, they will not consider petitions for sterilization. Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969) and In Re MKR, 515 S.W. 2d 467 (Mo. 1974). The status of people with disabilities is unclear where compulsory sterilization is concerned, in the remainder of the states with no governing law.

"least restrictive alternative."[14] Another thirteen States, however, have held or recognized by statute that the Fourteenth Amendment's protection of procreative autonomy and bodily integrity requires proof that sterilization must not only be in the best interest of the

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14 Florida (West Florida Stat. Ann. § 744.3215(4)(e); Hawaii (30A Ha. Stat. Ann. Ch. 560); Indiana (P.S. by Harbin v. W.S., 452 N.E.2d 969 (Ind.1983)); New Hampshire (In re Penny N., 120 N.H. 269, 414 A.2d 541 (1980)); New Jersey (In re Grady, 85 N.J. 235, 426 A.2d 467 (1981)); Washington (In re Hayes, 608 P.2d 635 (Wash. 1980)). Arkansas and Utah utilize the substituted judgment analysis in place of the best interest test. See Arkansas Code § 20-49-101 and 20-49-201 and Utah Code § 62A-6-108-(1)(e)(1989). Some of these States consider whether sterilization is least restrictive as one factor in the best interest analysis, but do not require that the best interest decision rest upon it. This was the type of analysis utilized by the Pennsylvania court in this case.

individual but be the least restrictive alternative.[15]

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15 Alabama (Wyatt v. Aderholt, 368 F. Supp. 1383 (1974) (re: institutionalized people with retardation)); Alaska (Matter of C.D.M., 627 P.2d 607 (1981)); California (West Ann. Cal. Probate Code § 1950 (1991); Colorado (In the Matter of A.W., 637 P.2d 366 (1981)); Connecticut (Conn. Gen. Stat. Ann. § 45a-690(d)(4) (West 1981 & Supp. 1992)); Maine (34-B Maine Revised Stat. Ann. § 7001-17 (1988) as construed in In Re Debra B., 495 A.2d 781 (Me. 1985)); Minnesota (Minn. Stat. §525.56(4)(c) (West 1991), In the Matter of the Welfare of Hillstrom, 363 N.W.2d 871 (Minn. Ct. App. 1985); North Carolina (Matter of Truesdell, 313 N.C. 421, 329 S.E. 2d 630 (1985)); Oregon (Ore. Rev. Stat. §436.205(1)(1991)); Vermont (18 Vt. Stat. Ann. § 8711 (1987)); Virginia (Va. Code Ann. § 54.1-2977.A.3); West Virginia (9 West Virginia Code § 27-16-1(1966)); Wisconsin (In re Eberhardy, 307 N.W.2d (Wis. 1981)). Massachusetts utilizes the substituted judgment standard in place of the best interest test. Matter of Moe, 632 N.E.2d 712 (Mass. 1982). In Matter of Terwilliger, Pennsylvania required that sterilization be proven to be least restrictive. In the case at bar, however, this requirement was utilized as just one factor in the best interest analysis, leaving some doubt as to what the Pennsylvania standard actually is.

Thus, the States have, in their capacity to appoint guardians of the person, divided on the minimum substantive standard for governmental action that will infringe the federal constitutional right of bodily integrity and reproductive autonomy. Some states continue to permit sterilization in the interests of the public without regard to the interests of the individual. Of those states which have considered the issue, the principal division is between those states that require only that sterilization be found to be in the "best interests" of the individual and those that hold that federal constitutional rights require also that sterilization be the "least restrictive alternative" or "medically necessary."

Compare, for instance, the Pennsylvania decision below with Matter of

Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983), modified and affirmed, 313 N.C. 421, 329 S.E.2d 630 (1985). There, the North Carolina courts refused to authorize the sterilization of an eighteen year old woman with Down Syndrome. They held that the Fourteenth Amendment requires, for a sterilization order, a finding that there is a substantial likelihood that the respondent will voluntarily or otherwise engage in sexual activity likely to cause impregnation" and that "the proposed method of sterilization entails the least invasion of the body of the respondent." 63 N.C. App. at 279, 304 S.E.2d at 806 and 313 N.C. at 429, 329 S.E.2d at 635. Since Ms. Truesdell was highly supervised and not likely to become

pregnant, sterilization was held to be unconstitutionally intrusive. [16]

Similarly, in In Matter of Welfare of Hillstrom, 363 N.W.2d 871 (Minn. App. 1985), the Minnesota Court of Appeals rejected the notion that sterilization could be ordered on a finding of "best interest," without a finding that it was the "last resort" and necessary to prevent an imminent danger of pregnancy. Shirley Hillstrom, because of health problems, could not use birth control pills. How-

16 Matter of Guardianship of Hayes, 93 Wash.2d 228, 608 P.2d 635 (1980) (sterilization may not be ordered without clear and convincing need for contraception based upon evidence of sexual activity under circumstances likely to result in pregnancy); North Carolina Association of Retarded Children v. North Carolina, 420 F. Supp. 451, 57 (D.N.C. 1976) (requiring evidence of likelihood of sexual activity without contraception because it "must have been the sense of the legislature to require only that which is necessary").

ever, like C.W., she was closely supervised and was not sexually active. The court concluded that a best interest standard, standing alone, inadequately protected Ms. Hillstrom's constitutional rights.

If C.W.'s case had been heard in North Carolina, Minnesota, or another State which precludes a finding of best interest unless sterilization is least restrictive, the petition would have been denied on federal constitutional grounds. The "best interest" analysis utilized by the court below elevated the focus upon C.W.'s medical condition, and bypassed the question of whether pregnancy is a realistic risk and trivialized the constitutional significance of less restrictive alternatives.

Thus, the same division which divides the States also divided the Court below.

The majority of the Superior Court of Pennsylvania made no effort to find a compelling need for sterilization and subordinated the requirement that sterilization be the least restrictive alternative to its subjective determination of what it believed to be C.W.'s "best interest." The dissent argued that sterilization would be unconstitutional unless shown to be the "least restrictive alternative" and supported by a compelling state interest, that is, necessary for the life or health of C.W. given her present circumstances. Accordingly, this case provides the Court with the ideal opportunity to choose between the various standards and to establish a uniform standard among the States.

C. The Least Restrictive Alternative Standard Is Required To Prevent Needless Sterilization of Individuals with Mental Retardation.

"Sterilization involves a surgical invasion of bodily integrity. It destroys an important part of a person's social and biological identity."[17] An individual's right to bodily integrity is fundamental, as is the right to procreative autonomy, regardless of whether the right will ever be exercised to beget a child.[18] A decision to surgically sterilize one of

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17 Matter of Romero, 790 P.2d 819, 821 (Colo. 1990).

18 See Conservatorship of Valerie N., 707 P.2d 760 (Cal. 1985), (Bird, Dissenting) at 784-7 (preservation of one's bodily functions is a fundamental right, and the termination thereof constitutes a serious invasion of the sanctity of the person). The dissent in Valerie N. ultimately prevailed, since the case was effectively overruled by statute. See West Ann. Cal. Prob. Code § 1950 (1991).

our fellow citizens, without her or his consent, is a decision to permanently deprive that person of "a basic liberty." Skinner v. Oklahoma, 316 U.S. at 541.

Permitting sterilization with only a judicial determination that it is in an individual's "best interests" permits judicial officers to impose on other individuals subjective judgments on contraception that society would not tolerate in any other circumstance. The "best interest" standard also permits courts to delegate extraordinary decision-making authority to surrogates without any objective limitations.

As this case demonstrates, without a strict standard to circumscribe a State's authority, decisions can easily be justified as in the individual's best interest, based upon stereotypical notions which

minimize or ignore altogether the importance of constitutional rights to people with disabilities. Decisions can also be manipulated to sacrifice fundamental rights in order to serve the convenience of a parent, guardian or social worker or the public at large in preference to the true interests of the individual. [19]

In this case, unless this Court intervenes, application of the subjective best interest standard will require C.W. to subject herself to a two day hospitalization, and isolation from familiar surroundings which can be upsetting even to people without retardation. She will

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19 Some courts, like the majority of the Superior Court below, have shown great deference to the preferences of parents and guardians of the incompetent individual; other courts have pointed out that these individuals have conflicting interests. See, e.g., In re Eberhardy, 307 N.W.2d at 896.

be required to undergo preoperative procedures, including blood work and intravenous and urinary catheterization. She will be subjected to general anesthesia and its attendant risks, and post-operative pain, without proof that she is truly at risk for pregnancy and despite proof that birth control pills and/or education, super-vision, and training are workable alter-natives.[20] In short, C.W. will be required to undergo a surgical procedure that almost certainly is unnecessary.

Roughly three percent of the population of the United States has been

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20 For most women, surgical sterilization is a much simpler procedure, sometimes even performed during an office visit under local anesthesia. C.W.'s seizure condition complicates matters, and will require general anesthesia and more intensive medical supervision.

diagnosed with mental retardation. Each of these individuals is potentially subject to a court petition for sterilization. We cannot know what fertility means to these individuals. Nor can we know what trauma an unnecessary surgical procedure will inflict. Only the most powerless members of our society are subject to such intrusions upon their persons. This Court must finally equalize their simple right to be left alone, "the most comprehensive of rights and the right most valued by civilized men". Olmstead v. United States, 227 U.S. 438, 478 (1927).

D. C.W. Is In No Imminent Danger Of Pregnancy And Less Restrictive Methods Are Available To Protect Her From Becoming Pregnant.

If the Constitution requires a court to find a compelling State interest and if sterilization must be the least restric-

tive alternative before it can be ordered, the order authorizing the sterilization of C.W. must be reversed. There is no compelling State interest because sterilization is not needed to prevent pregnancy. C.W. is not sexually active and is under constant supervision because of her seizure condition. The likelihood that she will become pregnant as a result of being sexually victimized is remote.

Moreover, sterilization is not the least restrictive approach to contraception. Birth control pills and other hormonal methods of contraception have not been tried, and there is no medical testimony that they would be unworkable.[21] Indeed, the expert witnesses favoring sterilization acknowledged that were it

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21 Tr. at 113-114, 231, 253-4; Tr. 8/17/89 at 67, 75; Guardian's Exhibit 11.

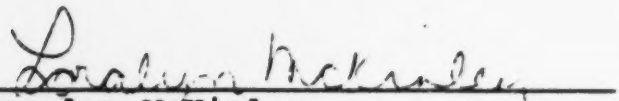
not for C.W.'s mental retardation, other medical facts remaining equal, they would not have recommended sterilization. See Trial Record at 110, 248, and Trial Record 8/17/89 at 59-60.

Should this Court grant this petition, petitioner will ask the Court to reverse the decision of the Superior Court of Pennsylvania and reverse the order of the trial court.

CONCLUSION

Petitioner accordingly requests that the Court grant certiorari in this case.

Respectfully submitted,



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DATE: November 15, 1994

Supreme Court, U.S.
FILED

(2) 94 892 NOV 15 1994

No. [redacted]

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

C.W., By Her Guardian Ad Litem,
Loralyn McKinley, Esquire, Petitioner,

v.

Dolores Wasiek, Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of Pennsylvania

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA PART I

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IN THE SUPREME COURT OF
PENNSYLVANIA
EASTERN DISTRICT

NO. 334 Eastern District
Allocatur Docket 1994

ESTATE OF C.W.,	:
AN ALLEGED INCOMPETENT	:
	:
PETITION OF: LORRIE McKINLEY,	:
ESQ., GUARDIAN AD LITEM FOR C.W.	:

O R D E R

PER CURIAM

AND NOW, this 17th day of August, 1994, the Petition for Allowance of Appeal from the Superior Court is hereby denied.

Mr. Justice Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1801, due to the unavailability of Mr. Justice Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.

TRUE COPY FROM RECORRD
Attest: August 18, 1994

/s/
PATRICIA JOHNSON
Chief Clerk
Supreme Court of Pennsylvania
Eastern District

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 02970 PHILADELPHIA 1991

ESTATE OF C.W., :
AN ALLEGED INCOMPETENT :
:
APPEAL OF: LORRIE McKINLEY, :
ESQ., GUARDIAN AD LITEM FOR C.W. :

Appeal from the Decree August 01, 1991, In the Court of Common Pleas of Philadelphia County, ORPHANS, No. 3107 of 1987

BEFORE: ROWLEY, P.J., McEWEN, DEL SOLE, BECK, TAMILIA, POPOVICH, JOHNSON, HUDOCK and FORD ELLIOTT, JJ.

OPINION BY BECK, J.:

The issue presented in this case is whether a guardian should be appointed for C.W., a 24 year old mute woman with a mental age of 3-5. She suffers from moderately severe retardation, grand mal epilepsy, cerebral palsy and scoliosis. The trial court determined that it was in C.W.'s best interest that her mother be

appointed as her guardian, with specific authority to consent to a laparoscopic tubal ligation.

The trial court's decision reflects an exceedingly careful consideration of the voluminous record and is in accord with the law of this Commonwealth. We affirm.

We have carefully examined the record in this case to determine whether it supports the judge's findings regarding C.W.'s mental and physical condition. We have also reviewed the expert opinions regarding the available medical and non-medical options, and the governing legal standards. We begin by emphasizing that in this case we are not confronted with a legal tabula rasa. The standards governing a determination of whether sterilization of an incompetent is to be permitted

were established in 1982 in In the Matter of Mildred J. Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1982), and our analysis simply applies the legal principles established in Terwilliger to the facts of this case. [1]

In Terwilliger, the father of a mentally retarded woman sought to have the court declare his daughter incompetent and to have himself appointed as her guardian

---

[1] While this case was pending on appeal, the Pennsylvania legislature enacted certain revisions to Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes. See, e.g., 20 Pa. C.S.A. §5521 (1992). In part, these revisions relate to the appointment and powers of guardians of incapacitated persons. Although the revisions do not apply to the case before us, we note that the revisions do confirm the jurisdiction of the court of common pleas, including the Orphans' Division, over the appointment of guardians and require that the court grant specific authority to a guardian to consent to a sterilization of an incapacitated person.

for the purpose of consenting to her sterilization by tubal ligation. The trial court granted both requests. On appeal, a panel of this court reversed and remanded for further proceedings. The Terwilliger court first determined that the Orphans' Court had jurisdiction to grant the requested relief. [2] The court then proceeded to establish clear guidelines for the decision of such cases. The court began with the following cautionary statements:

> We caution that because sterilization necessarily results in the permanent termination of the intensely personal right of procreation, the trial judge must take the greatest care to ensure that the incompetent's rights are jealously guarded.
>
> [I]n making the decision of whether to authorize sterilization, a court should consider only the best inter-

---

[2] The jurisdiction of the court of common pleas to grant such relief is not at issue in this appeal.

> est of the incompetent person, not the interests or convenience of the individual's parents, the guardian or of society.

Id. at ___, 450 A.2d at 1382 (emphasis supplied).

Thus, the Terwilliger court recognized that a decision that an incompetent should undergo a sterilization procedure impinges on that person's fundamental right to procreate and involves an invasion of that person's bodily integrity.

With these principles in mind, the Terwilliger court made several procedural determinations. First, the court found that given the fundamental right involved in such cases, the party seeking approval of the sterilization procedure had the burden of proof and that the standard of proof required was that of clear and convincing evidence. Id. Even more importantly, the Terwilliger court

established that the crucial question to be answered in such cases was whether the sterilization was in the best interest of the incompetent.

The court then required that a guardian ad litem be appointed to represent the interests of the incompetent at the hearing, that comprehensive medical, psychological and social evaluations be made of the incompetent, and that the trial court be permitted to appoint its own experts to assist in the evaluation of the incompetent. Further, the court stated that although the incompetent need not be at the hearing, the trial court should meet with the incompetent to form the court's own opinion as to competency and elicit any views regarding the sterilization that the incompetent would be able to express.

Having established these procedural ground rules, the Terwilliger court mandated two specific findings by the trial court as necessary prerequisites to authorizing the sterilization. First, the court must find that the individual lacks capacity to make a decision about sterilization and that the incapacity is not likely to change in the foreseeable future. Second, the court must find that the incompetent is capable of reproduction. If the court is able to make these findings, then the court must proceed to its ultimate determination, i.e., is sterilization in the incompetent's best interest?

Terwilliger viewed the best interest determination as ultimately depending on a finding that:

> sterilization is the only practicable means of contraception, i.e., all

> less drastic contraceptive methods, including supervision, education and training are unworkable and detailed medical testimony must show that the sterilization procedure requested is the least significant intrusion necessary to protect the interests of the individual.

Id. at --, 450 A.2d at 1383.

The Terwilliger court provided the following non-exclusive list of "guidelines", adopted from the decision of the Supreme Court of New Jersey in In re Grady, 85 N.J. 235, 426 A.2d 467 (1981), to assist the trial court in making this decision:

> (2) The possibility that the incompetent person will experience trauma or psychological damage if she becomes pregnant or gives birth, and, conversely, the possibility of trauma or psychological damage from the sterilization operation.
>
> (3) The likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her.

(4) The inability of the incompetent person to understand reproduction or contraception and the likely permanence of that inability.

(7) The ability of the incompetent person to care for a child, or the possibility that the incompetent may at some future date be able to marry and, with a spouse, care for a child.

(8) Evidence that scientific or medical advances may occur within the foreseeable future which will make possible either improvement of the individual's condition or alternative and less drastic sterilization procedures.

(9) A demonstration that the proponents of sterilization are seeking it in good faith and that their primary concern is for the best interests of the incompetent person rather than their own or the public's convenience.

Id. at ---, 450 A.2d at 1383-84 (quoting In re Grady, supra).

Despite the apparent specificity of these guidelines, the Terwilliger court wisely allowed the trial court latitude in making the ultimate determination of the best interests of the incompetent. Thus,

the court expressly stated that the list was not exhaustive, and that the weight to be accorded to each factor would appropriately vary in each case.

It is against this clear legal standard that we must judge whether it is in the best interests of C.W. that a guardian, with authorization to consent to a tubal ligation of C.W., be appointed. [3]

---

[3] Amici curiae, Pennsylvania Protection & Advocacy, Association for Retarded Citizens--Pennsylvania, Association for Retarded Citizens--Allegheny County, American Civil Liberties Union of Greater Pittsburgh, and the Association for Persons with Severe Handicaps--Pennsylvania, argue that we should modify Terwilliger. Amici seek to have us require that no incompetent be sterilized unless the court has first found that there is clear and convincing evidence that the incompetent is already engaged in voluntary sexual activity. Amici urge that we eliminate all consideration of the likelihood that an incompetent who is not already engaging in voluntary sexual activity might do so in the future or of the likelihood that the incompetent may be sexually abused.

As to the appellate court's standard of review, the Terwilliger court instructed:

> Additionally, because of the sensitive and irrevocable nature of a sterilization operation, we wish to make it clear that appellate review of the instant type of case will be of the broadest scope, and this court will not be bound by the interference or deductions of the lower court.

Id. at ---, 450 A.2d at 1384.

We begin with a brief statement of the procedural history of this matter, followed by a general description of C.W.'s physical and mental disabilities, her personality and emotional nature, and her living arrangements and activities. We then proceed to a thoroughgoing review of the expert opinion testimony received

---

(footnote 3 continued)

This is in clear contravention of the Terwilliger standard, of which we fully approve, and would not be a salutary change in the law.

by the trial court insofar as it is pertinent to each of the findings and guidelines identified in Terwilliger. Finally, we analyze all of this information in light of the dictates of Terwilliger.

PROCEDURAL HISTORY

This action was initiated in the Orphans' Court Division of the Court of Common Pleas for Philadelphia County through the filing of a petition by C.W.'s mother (sometimes hereinafter referred to as "petitioner"). Petitioner sought appointment as C.W.'s guardian, with specific authority to consent to the performance of a tubal ligation on C.W. As required by Terwilliger, the trial court appointed a guardian ad litem to represent the interests of C.W. Both the petitioner and the guardian ad litem engaged numerous experts to examine C.W.,

to opine on her mental and physical condition and, more specifically, to address the subject of her best interests in regard to contraception and sterilization. Very early in the proceedings, the guardian ad litem took the position that performance of a tubal ligation was not in C.W.'s best interests.

Hearings were held on March 22, April 14, April 15, May 12 and June 6, 1988. At these hearings, extensive testimony from witnesses called by both parties was taken. The trial judge determined that it was not fruitful for C.W. to be present, in that she clearly could not participate and did not understand the proceedings. The trial judge did personally interview C.W. in chambers. After the completion of the initial hearings, the trial judge determined that she needed additional

expert testimony, and engaged the services of Dr. Bolognese, Chairman of the Department of Gynecology and Obstetrics at Pennsylvania Hospital. Further hearings were conducted on August 17, 1989, at which Dr. Bolognese testified. At the request of petitioner, additional testimony from certain witnesses who had previously testified and from certain new witnesses was taken at a final hearing on October 4, 1989.

On February 28, 1990, the trial court entered an order granting the petition and authorizing the petitioner to consent to the performance of a laparoscopic tubal ligation on C.W. The trial court accompanied its order by a 53 page opinion in which it reviewed the extensive testimonial and documentary evidence and analyzed it under the Terwilliger standard. Excep-

tions filed by the guardian ad litem were denied by an en banc panel of the Orphans' Court and the trial court's order was made final by decree entered August 1, 1991. This time appeal ensued. [4]

GENERAL BACKGROUND

C.W. is a 24 year old woman who has suffered since infancy from scoliosis, cerebral palsy, grand mal epilepsy and moderately severe retardation. Although the precise cause of her condition is not clear, it is agreed that her mental and physical disabilities are irreversible. Her seizure disorder is extremely severe. In some years of her life, C.W. has experienced over 50 seizures, some of which are severe and can last for over an hour.

[4] As this recitation reveals, the trial court assiduously followed the procedural requirements of Terwilliger in its handling of this case. Neither party argues to the contrary.

Every day she is administered three drugs, Phenobarbital, Dilantin and Tegretol, some in toxic doses, to control her epilepsy. Even this treatment is not fully effective. Any virus, infection or fluctuation in her temperature may affect her medications and cause her to have a seizure. Without medication, she could experience status epilepticus where she would seize repeatedly. Such attacks are known to be fatal.

The record reveals at least one specific example of the severity and instability of C.W.'s epileptic status. At one point in 1989, C.W.'s behavior became more aggressive and self-abusive. It was thought that her Dilantin level was too high and was possibly contributing to her behavior problem. Although her neurologist was reluctant to do so, the

Dilantin dosage was reduced. C.W. then experienced a severe seizure and her medication level had to be increased to a toxic level to stabilize her. Even at this level, C.W. seized again. C.W.'s primary physician identified this episode as a reminder of how difficult it is to control C.W.'s epilepsy.

C.W. suffers from organic brain damage and is mute. She communicates in a very limited fashion through minimal signing and making certain noises that those around her have learned to interpret. Experts who have evaluated C.W. agree that her mental age is in the range of a three to five year old and that her I.Q. is in the range of 30 to a possible high of 50.

Perhaps the best indication of who C.W. is can be gleaned from her interaction with the trial judge, who saw her

in the courtroom at the beginning of the hearings in this matter and who later interviewed C.W. privately in chambers, as required by Terwilliger. When C.W. was in the courtroom, she was completely oblivious to what was happening around her. She reacted only when her name was spoken. She had with her a Sesame Street hand puppet, which she frequently waved at the judge. When interviewed, C.W. revealed a pleasant and affectionate nature. She hugged various people whom she had never before met. The trial judge described the session as follows:

> [C.W.] concentrated primarily on a Walkman tape. She signed that she had brought her nephew, Ricky, into this world, that girls differ from boys in that women carry purses. In response to questioning, she signed, without differentiation, that she would like to have a baby, that she would also like to have a puppy, that babies can be bought in a store and that her brother and sister-in-law had bought her nephew, Ricky. When

> asked to write her name, she wrote her first name. She willingly hugged everyone in the room, including a male court clerk who was called in to test her response to an unknown male. She did not know the differences between male and female. When asked how "babies get in tummies," she pointed to a necklace on a doll. She paid scant attention and drifted from any area on which the Court tried to focus her attention. She was able to write "dog" when shown a picture of the Judge's puppy and a rabbit. She was extremely suggestible, compliant and anxious to please. Her affect was that of an uncommunicative pre-school child. It would have been futile and well beyond her ken to have discussed reproduction and contraception with her.

Trial Court Opinion, at 5-6.

C.W.'s legal residence is with her mother at her home in Philadelphia. However, since C.W. was twelve she has lived in a community living arrangement (a "CLA") operated by Ken Crest Centers, Inc. C.W. was placed in the CLA because she had become increasingly difficult to control at home, sometimes refusing to eat or take

her medications and disrupting the rest of the family. Although at the time of the hearings in this matter C.W. lived in a CLA in which a total of five disabled persons lived, it would appear that she is now living with only two other people. Every other week, C.W. spends her weekend at her mother's home. She also goes home for holidays. While there, she often visits her brother's home.

At the time of the initial hearing, C.W. was attending a life skills program at Northeast High School and on alternate weeks she attended Swenson Skills Center. During these proceedings, however, she graduated from her high school program and was to begin working in a sheltered workshop for the mentally disabled. It is anticipated that, if sufficient funding is

available, C.W. will continue to live in a CLA and go to the sheltered workshop.

In summary, C.W. has a mental age of between 3 and 5 and communicates on a minimal level. Her physical disabilities, including epilepsy, cerebral palsy and scoliosis, mean that she lives in a fragile and unpredictable state.

REQUIRED PRELIMINARY FINDINGS

Capacity of C.W. to Make a Decision About Sterilization

C.W.'s inability to make a decision concerning her own sterilization is beyond dispute. C.W. has no understanding of sexual or reproductive functions. As the trial judge noted, C.W. cannot identify the differences between men and women. All the experts who testified at the hearing and rendered an opinion on this subject stated that C.W. is not competent to given informed consent to a sterilization

procedure or any other medical procedure, and never will be.

Reproductive Capability

Gynecological examination of C.W. revealed nothing that would indicate that she is incapable of reproduction. She has experienced normal development of her reproductive organs and has a regular menstrual cycle. Although C.W. has never been pregnant, all the experts qualified to express an opinion on this subject agreed that there was no reason to believe that C.W. was incapable of reproduction.

BEST INTEREST DETERMINATION

In analyzing the ultimate question of what is in C.W.'s best interest, we must consider, as did the trial court, the various factors enumerated in Terwilliger, in light of pertinent information in the record. Several of the Terwilliger,

factors merit little discussion, since they are not subject to serious dispute.

First, addressing factor 2, the evidence squarely supports the trial court's conclusion that C.W. might well experience severe, even life threatening, trauma were she to become pregnant. In contrast, the possibility of trauma or psychological damage resulting from the proposed tubal ligation is minimal. Expert testimony revealed that although the physical effect of a pregnancy on C.W.'s epileptic status was unknown, it might well be extremely damaging. Dr. Seitz, a board certified gynecologist, testified as follows regarding the various predictable effects of a pregnancy on C.W.:

> [T]he old thought was a third of the patients with epilepsy becoming pregnant will experience more frequent seizures, a third will not be affected, and a third will actually improve.

> Now, that's the better end of the scale. There are other studies that show from 45 to 50 percent of epileptics will be more seizure prone during pregnancy.
>
> ....
>
> ... so I think there is a distinct possibility of aggravating the condition with pregnancy. Pregnancy I think would be extremely traumatizing emotionally....
>
> I think a therapeutic interruption of the pregnancy could well be extremely traumatic as well as carry with it the usual complications of perforation and hemorrage and infection,....

The other experts who testified on the question of the effect of a pregnancy on C.W., including Dr. Sternbach, C.W.'s primary physician, and Dr. Bolognese, the impartial expert who testified at the trial court's request, concurred in the view that pregnancy is highly inadvisable for C.W. The testimony revealed that certain of the medications C.W. takes, and without which she might well die, are

known to cause congenital defects in a developing fetus. Moreover, C.W.'s epilepsy could cause a spontaneous abortion or premature birth. Even if C.W. carried the pregnancy to term, it might be inadvisable to allow her to experience labor and delivery, because of the time and medication involved. A caesarean section, which is a major operative procedure, would then have to be performed. Lastly, the testimony of Dr. Heller, a board certified psychiatrist, was to the effect that a pregnancy could be psychologically traumatic for C.W., particularly in the unlikely event that she could carry the pregnancy to term and would then have to be separated from the child due to her inability to care for it.

In contrast, the expert medical testimony revealed that performance of a

tubal ligation would be a relatively non-traumatic event for C.W. C.W. would not comprehend the nature or effect of the procedure on her ability to procreate. Nor would her menstrual cycle or feelings of femininity be affected. Therefore, there would likely be no psychological damage or behavioral effect. Regarding the physical nature of the procedure, the experts agreed that it involves a very small incision and is customarily performed on an outpatient basis, following which the patient returns home and is back to normal within 72 hours. The small incision is made in the area of the navel and is regarded as a minor procedure. Because of C.W.'s other problems, her procedure would be done on an in-patient basis, but she would return home within a day or two after the procedure. The

mortality rate is one to three in 100,000 and is generally related to the anesthetic. [5]

In sum, the record is clear that the risks and trauma associated with a pregnancy far outweigh the risks and trauma associated with a tubal ligation.

Second, addressing factor 4, the record overwhelmingly demonstrates that C.W. is incapable of understanding reproduction or contraception and that this situation is likely to be permanent.

Third, addressing factor 7, the record also overwhelmingly demonstrates that C.W. is incapable of caring for a child and that this situation will not

[5] We discuss more fully the precise nature of a tubal ligation in a later section of this opinion where we consider in detail all of the various medical contraceptive and sterilization options available to C.W.

change. C.W.'s mental and physical disabilities render her substantially incapable of caring for herself, let alone another person.

Fourth, addressing factor 8, and despite appellant's argument to the contrary, there is no evidence in the record that scientific or medical advances in the future will make possible a relevant improvement in C.W.'s own condition or that any relevant developments in sterilization techniques are imminent. The trial court explored this question fully and correctly found that there is no medical evidence that a cure for epilepsy is on the horizon, or that C.W.'s brain damage can ever be repaired. Nor was there any suggestion by any expert that medical science is on the brink of developing a new contraceptive or sterilization

technique that would have a materially different effect on a person in C.W.'s difficult mental and physical condition. Dr. Bolognese specifically testified that he was not aware of any such medical advances. [6]

Lastly, addressing factor 9, the record strongly supports the trial court's conclusion that C.W.'s mother is acting in the interest of C.W. alone in seeking permission to have her sterilized. C.W.'s mother revealed only the greatest concern

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[6] The guardian ad litem makes much of the fact that during the pendency of this case hormonal contraceptives like Depo-Provera and Norplant have become generally available in this country. This, of course, is irrelevant to our consideration of this case, since there was testimony concerning these hormonal contraceptives at the hearings in this matter and that testimony, albeit scant, revealed that such treatments have not been widely enough employed for anyone to know what effect that might have on C.W.'s severe medical problems.

and affection for her daughter. She testified that her only desire was to improve the quality of her daughter's life and to protect her from any further pain. The trial court found the mother credible and found that she was not acting in her own interest. [7] We further emphasize that this is not a case where the spectre of eugenic sterilization, i.e. sterilization to prevent the birth of a "defective" child, is raised. Only C.W.'s own best interests are at issue.

We now proceed to consider the only two questions that are actually in dispute in this case in determining C.W.'s best interest. They are factor 3, the likelihood that C.W. will either voluntarily or

---

[7] We further note that C.W.'s father, who is now divorced from her mother, executed an affidavit in which he concurred in the mother's petition.

involuntarily engage in sexual activity, and the overriding general requirement of Terwilliger, i.e., that the procedure proposed is the only practicable means of contraception. It is on these two factors that the guardian ad litem has based her opposition to the performance of a tubal ligation on C.W. Simply stated, the guardian has argued that C.W. is constantly monitored and is not now nor will she ever be at risk of pregnancy. Moreover, the guardian has argued that even if a risk of pregnancy is perceived, other contraceptive measures are preferable. The guardian has suggested the use of education and training or the birth control pill or other hormonal treatment.

The guardian ad litem has emphasized that in this Commonwealth, services to the mentally retarded are governed by the

closely related principles of normalization and least restrictive alternative. As described by James McFalls, Director of Residential Services at Ken Crest, who testified at these proceedings on behalf of the guardian ad litem, normalization requires that the environment provided to mentally retarded persons be as close as possible to the environment in which they would function if they had no handicap. The least restrictive alternative concept means that services are not provided to persons at a level that is more intensive or restrictive than is necessary for that person to live a normal life. These principles seek to preserve the rights of the mentally retarded to live full and meaningful lives and to grow and develop to their fullest potential, without unnecessary intrusion.

We recognize that these principles have been sanctioned in Pennsylvania. See In re Schmidt, 494 Pa. 86, 429 A.2d 631 (1981); Mental Health Procedures Act, 50 P.S. 7101 (Purdon 1976). Also, the holding in Terwilliger is consistent with these principles since Terwilliger requires that sterilization be ordered only when it is the only practicable means of contraception, and further requires that the procedure chosen is the least physically intrusive method available. The question presented to us is how these principles are to be implemented in C.W.'s life, specifically in connection with the issues of contraception and sterilization, so as to serve her overall best interests.

Extensive testimony was presented regarding the likelihood that C.W. will engage in sexual activity. There are

actually two questions posed in this regard. First, would C.W. engage in sexual activity voluntarily. In one sense, any sexual intercourse with C.W. would be essentially nonconsensual, since it would appear that she is incompetent to give legally sufficient consent to sexual intercourse. Our reference to voluntary sexual activity is meant to refer to intercourse without force, that is, wherein C.W., for whatever reason, would not attempt to resist.

The record supports the trial court's finding that C.W. might be willing to engage in voluntary sexual intercourse. There is no evidence that her sexual development has not proceeded normally. Furthermore, the record reveals she has an excessively affectionate nature and desires physical closeness. The record is

full of references to C.W.'s affectionate nature. More than one witness testified that C.W. appears to crave physical contact with others, including strangers. During C.W.'s interview with the trial judge, she indiscriminately hugged the judge's female law clerk and a male court employee C.W. had never seen before. During C.W.'s examination by Dr. Knast, a psychologist who evaluated her, she exposed her stomach to him and attempted to tickle his. Dr. Bolognese, the court appointed gynecologist who examined C.W., found her to be almost coquettish in demeanor. [8] The opinion of Ms. Lewin, a

[8] Interestingly, Dr. Bolognese's physical examination of C.W. also revealed that she does not have an intact hymen. This was a fact previously unknown to C.W.'s mother or, apparently, any other person involved in her care. The record does not reveal any reliable explanation for C.W.'s lack of an intact hymen.

psychologist who examined C.W. at the behest of the guardian ad litem, was aptly summarized by the trial court as follows:

> Ms. Lewin ... concluded that [C.W.] is not sexually active, has no awareness of sex, and her affectionate gestures are not indications of sexual interest. ... Ms. Lewin noted that when she asked permission of [C.W.] to touch her crotch, [C.W.] signed "OK" and emphatically "Yes." Ms. Lewin expressed her concern about [C.W.]'s vulnerability to being victimized and noted that the staff believes that if [C.W.] was left alone, she would go with anyone who was nice to her....
>
> Ms. Lewin determined that [C.W.]'s sexual activity is limited to masturbation, that she understands the concept of masturbation and was able to demonstrate it. During a discussion of intercourse, [C.W.] gestured to Ms. Lewin that she engaged in intercourse "all the time" and with every male she knows (her father, staff and CLA residents). She found that [C.W.] has an early adolescent awakening of feelings and fantasies, is keenly aware of her sexuality and femininity and uses both whenever possible, even where inappropriate. She engaged in inappropriate touching, especially with strangers.

Trial Court Opinion, at 25-6.

The record also reveals that in mid-1989, when C.W. visited her primary physician, the physician's notes include a reference to a comment by the caretaker who brought C.W. to the appointment. The notes indicate that the caretaker stated that there had been "increased kissing involvement" between C.W. and her "boyfriend". The record does not state who the boyfriend is or what C.W.'s precise relationship with him is.

Clearly, the picture of C.W. that emerges from this record is of a young woman who might voluntarily engage in sexual activity without comprehending the nature or possible impact of such activity. Moreover, the possibility of C.W. being victimized by sex forcibly being imposed on her is a true risk. The question therefore becomes: how likely is

it, given the realities of C.W.'s living circumstances, that she actually would, either voluntarily or by force, engage in sexual activity?

In answering this question, we must examine the various approaches to preventing C.W. from becoming pregnant which the guardian ad litem has proposed. She concludes that supervision and education and training will be effective. We have carefully reviewed the record to determine whether these approaches are or will be so effective that they will reduce the likelihood of C.W. engaging in sexual activity to a level that merits no further contraceptive measures in order to protect C.W. from the disastrous eventuality of pregnancy.

C.W. is presently closely supervised. She lives in a community living arrange-

ment with other mentally impaired persons and a staff of several people. She is not permitted to leave the CLA alone. Because of her seizure disorder, she is checked every 15 to 30 minutes during the day. It appears from the record that she is not equally well supervised at night. One staff member at the CLA testified that only one staff member is on duty at night and that she is not located on the floor where C.W.'s room is. Also, that staff member is permitted to and sometimes does sleep during the night. Immediately prior to the first hearing in this matter, a small intercom box similar to that often used by people with young babies was placed in C.W.'s room so that staff could monitor noises from C.W.'s room while in other areas of the CLA.

When C.W. left the CLA to attend high school or the skills center, she went by school bus. The record is not clear as to how well supervised she was at the high school and skills center, nor is it at all clear what level of supervision will be provided at the sheltered workshop.

The testimony revealed that the 15 to 30 minute supervision provided C.W. when she is at the CLA is deemed medically necessary and is more than is given to other residents. The trial court heard a great deal of testimony as to whether this level of supervision was adequate to safeguard C.W. from pregnancy. The court concluded it was not and we find substantial support in the record for the court's conclusion. The expert testimony was in conflict. Experts called by petitioner uniformly found this level of supervision

inadequate, noting that much can be accomplished that can cause pregnancy in less than 15 minutes. Experts called by the guardian ad litem felt that the level of supervision was adequate, reducing the possibility of pregnancy to a very low level, although admittedly not eliminating it. Dr. Bolognese, called by the trial court, agreed with those who testified on behalf of the petitioner and was reluctant to conclude that supervision was sufficient to prevent C.W. from becoming pregnant.

The record does not support the guardian ad litem's conclusion that C.W. is "never alone". C.W. is sometimes alone. This record contains specific testimony regarding the fact that during the day C.W. is left alone in her room at her CLA for periods of 15 to 30 minutes

and that in all likelihood at night she is left alone for considerably longer periods of time. C.W.'s mother testified that she initiated this proceeding because she was concerned that C.W. was not being supervised closely enough to protect her from the possibility of pregnancy. Her mother specifically related two incidents that gave rise to this concern. The first involved a situation where C.W. was on a picnic at Penn's Landing with others from her CLA and was permitted to go to the public ladies' room by herself. The second related to a time when C.W.'s mother was visiting the CLA and observed a young male resident of C.W.'s standing in C.W.'s bedroom door watching C.W. undress.

The record also contains specific evidence of what has happened to C.W. when she was left alone. On one occasion, C.W.

was in her room at the CLA. The staff person on duty was in the basement. She came up and heard a noise on the monitor coming from C.W.'s room. She then noticed the light in C.W.'s hall was out and saw a male resident of the CLA running from C.W.'s room. She went into C.W.'s room and found C.W. on her bed with her night-gown pulled up. C.W. was visibly upset and signed to the staff member that the male resident had touched her, pointing to her breasts, waist and pubic area. [9]

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[9] The guardian ad litem makes much of the alleged fact, which is based not on record evidence but rather on the representation of the guardian, that C.W. no longer lives with any male residents at her CLA. We do not find it appropriate to accord nearly the degree of significance to that fact as does the guardian. The absence of men living at C.W.'s CLA does not shield her from the possibility of contact with a man. Clearly there does not need to be a male residing in C.W.'s CLA for a man to be present there. Nor does anyone deny that C.W. may well come into contact with men at the home of her

In light of the above record evidence, we find the trial court was correct in rejecting the guardian ad litem's argument and in concluding that the level of supervision that has been given to C.W. up to now, which has been deemed medically sufficient by all those who care for her, may well be insufficient to protect her from sexual activity. [10] Thus, if super-

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(footnote 9 continued)

mother and other relatives, where she frequently visits, at her sheltered workshop, and at the social gatherings she sometimes attends.

[10] We reject the guardian ad litem's argument that the supervision level accorded to C.W. up to now has proven itself to be effective since there is no indication that C.W. has yet engaged in sexual activity. The fact is, no one knows whether she has engaged in sexual activity and, even if she has not, certainly no one knows whether she will in the future. Terwilliger does not require that we wait until there is actual proof of sexual activity before action is taken to protect

vision is to be relied upon as the sole contraceptive device to be provided to C.W., the level of supervision will have to increase. C.W. could not be permitted to be alone and she could not have any degree of personal freedom. In such an environment she could not develop with the same freedom that she otherwise might have. Clearly, such an approach is extremely restrictive and runs completely contrary to principles of normalization and least restrictive alternative.

The guardian ad litem also argues that education and training, coupled with the present level of supervision, is adequate to protect C.W. from becoming pregnant. The record reveals that C.W.'s

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(footnote 10 continued)

the incompetent from it. Terwilliger requires that we assess, inter alia, the likelihood of sexual activity.

capacity for absorbing education and training is severely limited. C.W. has twice received education and training in the areas of behavior management, appropriate social interaction and sexuality, including the basics of reproduction and the difference between male and female bodies. Several years ago, C.W. was given "good touch - bad touch" training to assist her in protecting herself against physical abuse. By the time the trial court interviewed C.W. in 1988, she had completely forgotten these lessons. As we have previously indicated, she continued not only to be willing to have physical contact with strangers, but actually to seek it. She had not learned the difference between appropriate and inappropriate social behavior and could not

indicate the differences between male and female bodies.

In 1989, during the pendency of these proceedings, training of C.W. in these areas was reinitiated. C.W.'s behavior had deteriorated. She had become uncooperative and engaged in self-abusive behavior such as biting and scratching herself. A behavior modification program was instituted. A sexuality consultant visited the CLA and provided training to the residents of the CLA once a month. Staff at the CLA reinforced these lessons in between the consultant's visits. Specifically, C.W. was given a form of training called "Circles," in which she was taught the appropriate manner of behaving with people who stood in various relationships to her, from stranger to friend to relative. The testimony at the

hearings in 1989 indicated that C.W.s behavior had improved and that she was retaining some of the information concerning appropriate social behavior.

Several of the experts who testified on behalf of the guardian ad litem stated their belief that C.W. is capable of learning the difference between appropriate and inappropriate social behavior. They opined that such training will render her less vulnerable to attack and less likely to engage in voluntary sexual activity.

Other experts were less sanguine. Dr. Heller, a psychiatrist called by the petitioner, did not believe that training would be effective in materially increasing C.W.'s comprehension of appropriate social behavior because her learning abilities are substantially impaired by

irreversible neurological damage. Dr. Knast, another psychiatrist who testified for petitioner, found that C.W. has difficulty in understanding the consequences of behavior. Although Dr. Knast did not rule out some improvement in C.W.'s behavior and understanding, he opined that it would take at least two to three years for her to develop the communication skills necessary for behavior modification.

We have carefully considered the evidence concerning the effectiveness of educating C.W. and we concur in the trial court's finding that education is not the answer. Even accepting that C.W.'s present training program has shown some results, it is simply a fact that no amount of training can protect C.W. from physical abuse. Moreover, from this record we cannot conclude with any degree of confidence

that C.W., with her substantial neurological damage, can be educated not to engage in voluntary sexual activity, given her apparent natural desire to have physical contact with those around her. C.W., at the age of 20, could still only write her first name, could not be separated from her Kermit the Frog puppet, thought that babies could be purchased at the store and was willing to have physical contact with total strangers. The record reveals her ability to learn and retain information and to modify her behavior is very limited.

We also concur in the trial court's recognition of the fact that no court can guarantee that education programs will be significantly effective to increase C.W.'s ability to understand and deal with sexuality or that even if there were such

programs that they would be available to C.W. on an on-going basis. The record reveals that the programs C.W. has participated in have not markedly increased her capacity to learn and retain the information conveyed. She is now 24. She has lived in her CLA since she was 12 and, in all likelihood, she has been capable of reproduction for almost a decade. It is particularly telling that when the trial judge interviewed C.W., she was still completely incapable of comprehending anything about reproduction or sexuality or of controlling her own behavior.

Although the guardian ad litem opposed any medical means of contraception or sterilization, arguing that none of these options were at all necessary to eliminate the possibility of C.W. becoming pregnant, the guardian also argued that if

a medical approach were deemed necessary, then methods short of tubal ligation were preferable. The medical options are: 1) barrier methods, such as an IUD or diaphragm; 2) hormonal treatments, such as Depo-Provera; 3) the birth control pill; and 4) tubal ligation. [11]

There was substantial agreement among the medical experts as to the relative advantages and disadvantages of each alternative. [12] In reviewing the testimony we have focused on the intrusiveness,

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[11] The guardian ad litem also argued that abortion should be considered as a method of dealing with the eventuality of C.W. becoming pregnant. The guardian argued that a first trimester abortion would be only as physically intrusive as a tubal ligation. The trial court rejected this alternative, and we find no error in the court's reasoning.

[12] All of these witnesses were called by either the petitioner or the trial court. The guardian ad litem did not call a doctor to contradict the medical testimony on this issue.

risks and effectiveness of each alternative. In doing so, we have followed the dictates of Terwilliger. Terwilliger requires that we choose the least intrusive approach, but also requires that we find the method chosen is the only practicable means of contraception for the incompetent. Thus, the Terwilliger standard recognizes that the effectiveness of the method chosen is a legitimate concern. Further, we have evaluated the trial court's conclusions regarding the medical risks posed to C.W. by each alternative.

Barrier methods were not recommended by any witness. Most such methods would require C.W. to be responsible for her own contraception, which is clearly beyond her capability. Any such method is impracticable in C.W.'s case. The IUD, which is placed by a physician, presents a risk of

infection or perforation and must be replaced every year. The risks posed by an IUD are too great, and the necessity of a medical procedure every year is too intrusive and may make it more intrusive than tubal ligation.

The sum and substance of the testimony of the experts regarding the hormonal treatments was that none of them have been widely enough used as contraceptive devices in this country for any expert to know what risks they might pose to C.W. given her substantial physical problems.

The third option is the birth control pill. The guardian ad litem has argued that if any medical contraception is deemed necessary, the pill should be given serious consideration. The guardian is correct that the pill is extremely effec-

tive, easily administered and requires no surgical procedure.

However, the guardian's argument in favor of the pill as a method of contraception <u>for</u> <u>C.W.</u> rests largely upon a letter from C.W.'s neurologist, Dr. Elliott A. Schulman, to the guardian. While Dr. Schulman was not called to testify, this letter was admitted into evidence. The letter apparently responds to an inquiry the guardian had put to Dr. Schulman, i.e., whether C.W. could receive general anesthesia in order to have a tubal ligation or whether she could be given the birth control pill. In the letter, Dr. Schulman states:

> Some patients have increased seizure frequency, others have decreased seizure frequency and some have no change while on birth control pills. This might be an option worth considering if you are hesitant putting her under general anesthesia.

The guardian ad litem considers this letter to be a statement by Dr. Schulman that the birth control pill is a "viable option" for C.W. Clearly, the guardian views Dr. Schulman as having endorsed the use of the birth control pill for C.W. The trial court did not agree. We find the more plausible interpretation of Dr. Schulman's letter to be that he considered the pill an option despite its possible adverse effects on C.W.'s seizure problem if general anesthesia had to be ruled out because of its medical risks.

The experts who actually testified regarding giving the pill to C.W. unanimously opposed it. They cited the following possible difficulties:

> 1. The birth control pill is not administered to women over the age of 35 and, therefore, it is not even potentially a permanent contraceptive approach. Since it is not expected that C.W.'s condition will materially

change, a potentially permanent solution is preferable.

2. The birth control pill can cause side effects in any woman. Some of these may indicate that more serious problems, like thromboembolic disease, are developing. If C.W. experiences such symptoms, she may not be capable of communicating that fact so as to enable the doctors to stop administering the pill or take other appropriate action.

3. Although the pill would be given to C.W. by her caretakers, if she refused to take her medications, as she has sometimes done in the past, the pill would be rendered totally ineffective.

4. The interaction of the pill with C.W.'s seizure medications is not known -- use of the pill may require readjustment of those medications, which are already difficult to establish at levels sufficient to control C.W.'s seizures.

Giving due recognition to the fact that the pill is less physically intrusive than a tubal ligation, the trial court gave this option serious consideration but ultimately rejected it. The trial court's conclusion that use of the

birth control pill would not be in C.W.'s best interests is supported in the record. The well-considered opinions of the medical experts reveal that the experts were concerned with the possible effect of introducing another strong medication into the existing array of medications C.W. already takes every day. C.W.'s seizure disorder is just barely manageable as it is. Her two severe seizures in 1989 are stark evidence of that fact. The trial court concluded there was no reason to inject a new element that may further destabilize her, particularly where that element is unquestionably only a temporary solution to a problem that in all likelihood is permanent.

Next we assess the trial court's conclusion that tubal ligation is in C.W.'s best interest. The testimony of Dr. Seitz

and Dr. Bolognese, both of whom are gynecologists and obstetricians with excellent qualifications and both of whom have performed hundreds of tubal ligations, described two types of tubal ligation, either of which could be performed on C.W.

Dr. Seitz recommended a mini-laparoscopy in which the fallopian tubes are cauterized in one section. The incision required is very small and post-operative discomfort is minimal. Most such procedures are done on an out-patient basis, although C.W. would have to be hospitalized to ensure that she is adequately medicated prior to surgery and to monitor her recovery thereafter. The risk of failure is one in 300 and the mortality rate is 3 in 100,000. There is no significant risk of complications. Most interestingly, the procedure is not permanent and, therefore,

is not actually "sterilization" as that word has traditionally been understood. In eighty percent of the cases, this form of tubal ligation is reversible. The tubes are simply rejoined in a relatively minor surgical procedure.

Dr. Bolognese performs a different form of laparoscopic tubal ligation in which the fallopian tubes are cauterized at three locations. The recovery period and discomfort level is the same, and the failure rate is four in 1,000. Dr. Bolognese stated that if the procedure is done by an experienced practitioner, there is a minimal risk of complications. This procedure is not reversible, but neither does it interfere with a woman's ability to conceive through in vitro fertilization.

The trial court's conclusion that tubal ligation by laparoscopy is beyond

any doubt the option that best serves C.W.'s medical and psychological interests is supported by the record. The procedure is not a dangerous operation and is not overly intrusive since it requires only a small incision into the area of the navel. It is extremely effective in contraception and it does not totally preclude C.W. from conceiving a child in the future in the very unlikely event that she is ever desirous or capable of having and caring for a child. [13] C.W. will not experience

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[13] Unlike the situation that appears to have been presented to the Terwilliger court, where the tubal ligation procedure proposed was irreversible and no alternative means of conception was possible for Ms. Terwilliger, we are not here presented with such a limited field of choices. The ten years since Terwilliger have seen the development of a highly reversible form of tubal ligation. In addition, even in the case of an irreversible tubal ligation, conception is not out of the question. Medical science has developed the in vitro fertilization procedure and is constantly

any reduction in her feelings of femininity or in her menstrual cycle. No psychological damage or behavioral modification is expected to result from the procedure since C.W. cannot comprehend the nature or effect of it on her ability to reproduce.

In determining the best interests of C.W., the trial court's decision in favor of allowing a tubal ligation does not demonstrate an error of law or abuse of discretion. We have carefully examined the trial court's findings and reasoning and are confident that all the information that is pertinent to the decision was before the trial court. In the end, the evidence demonstrates that despite the

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(footnote 13 continued)

perfecting new methods of enabling women to conceive despite severe damage to their fallopian tubes.

best efforts of all concerned to guard and educate C.W., the possibility of sexual activity and pregnancy does exist. That evidence also shows that no one can assess with precision how likely that eventuality is. The record is replete with the adverse impact of a pregnancy on C.W., and that pregnancy would be completely negative and perhaps even disastrous. Therefore, the trial judge was correct that C.W.'s best interests require that she be protected against that eventuality. Anything short of tubal ligation requires experimenting with various contraceptive medications that may cause her to experience more seizures, more pain and discomfort. When the alternative medical procedures are weighed against tubal ligation, a relatively simple and extremely

effective procedure, the latter emerges as the best option.

The best interests of C.W. require that a guardian with authority to consent to tubal ligation be appointed.

The order of the trial court is affirmed.

McEwen, J., concurs in the result.

Johnson, J., files a Dissenting Opinion.

Del Sole, J., joins the Dissenting Opinion by Johnson, J.

Hudock, J. files a Dissenting Statement.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 2970 PHILADELPHIA 1991

ESTATE OF C.W., :
AN ALLEGED INCOMPETENT :
:
APPEAL OF: LORRIE McKINLEY, :
ESQ., GUARDIAN AD LITEM FOR C.W. :

Appeal from the Decree entered
August 1, 1991, Court of Common Pleas,
Philadelphia County, Orphans' Court
Division at No. 3107 of 1987.

BEFORE: ROWLEY, P.J., McEWEN,
DEL SOLE, BECK, TAMILIA,
POPOVICH, JOHNSON, HUDOCK
and FORD ELLIOTT, JJ.

DISSENTING OPINION BY JOHNSON, J.:

In this appeal, we are asked to determine whether the proponents of sterilization have proven that sterilization is the only practicable means of contraception for C.W., a young woman with moderate to severe mental retardation, epilepsy and cerebral palsy. The majority wants us to infer that any attempt to administer the

birth control pill or other hormonal methods of contraception to C.W. would have disastrous effects on her already tenuous physical condition. Clearly, the medical experts were concerned with the possible effect of introducing another medication into the existing array of medications C.W. already takes. Nonetheless, the effect of the interaction of the pill with C.W.'s seizure medications is not known. The proponents of sterilization have not satisfied their burden of proving by clear and convincing evidence that less drastic contraceptive methods such as birth control pills and hormonal treatments are unworkable. Accordingly, I must respectfully dissent.

The majority, in concluding that sterilization is in C.W.'s best interests, determines that the trial court's decision

does not demonstrate an error of law or abuse of discretion. See Majority Slip Op. at 21. In so doing, my colleagues have abandoned the proper scope of appellate review. We have the broadest scope of review in cases such as this because of the permanent nature of a sterilization procedure. In the Matter of Mildred J. Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1982). I am dismayed that my colleagues have declined to exercise the full extent of our appellate powers in the discharge of our heavy responsibility in this case.

All parties to this action agree that C.W. may be capable of becoming pregnant and that full-term pregnancy would not be in C.W.'s medical or psychological best interests. It is undisputed that C.W. is incompetent to make a decision regarding

sterilization. It also remains uncontested that C.W.'s mother had only the best of intentions in seeking the tubal ligation on behalf of her daughter. However, I cannot agree with the trial court's conclusion that the best interests of C.W. require that a guardian with authority to consent to tubal ligation be appointed.

The parties to this action were, at all times, operating in good faith in this attempt to discern what is in the best interests of C.W. The most distinguished trial judge, the Honorable Judith J. Jamison, is to be commended on the thorough deliberation given to this important issue, as is evidenced by the extensive record and the painstaking consideration of the facts of this case contained in the trial court opinion. However, C.W.'s best interests do not automatically result from

the process of careful consideration. While the majority places some emphasis on the process, I am mindful that mistakes involving another's reproductive rights have been justified throughout history on the basis that a decision was only reached after careful consideration of all the issues and facts involved.

In our determination of this appeal, we are bound by the standard enunciated in Terwilliger, supra. In deciding whether to authorize sterilization, we may only consider the best interests of the incompetent and we are not permitted to consider whether sterilization serves the interests or convenience of that individual's parents, guardian, or of society. Id. at 564, 450 A.2d at 1382. The proponent of sterilization must prove that sterilization is in the incompetent's best

interests by clear and convincing evidence. Id. at 564, 450 A.2d at 1383.

The Terwilliger court articulated three minimum requirements with which the trial court must comply before authorizing sterilization. First, the trial court should appoint a guardian ad litem and insure that appropriate medical, psychological and social evaluations are made of the incompetent person, with evidence of these evaluations to be preserved in the record. Id. at 565, 450 A.2d at 1383. Second, the trial court must find that the individual lacks the capacity to make a decision about sterilization and that the incapacity is unlikely to change in the future. Id. Third, the proponent of sterilization must prove that the person from whom sterilization is sought is

capable of reproduction, and that sterilization is the only practicable means of contraception, i.e., all less drastic contraceptive methods, including supervision, education and training are unworkable. Id. Detailed testimony must show, to a reasonable degree of medical certainty, that the sterilization procedure requested is the least intrusive means necessary to protect the interests of the individual. Id.

I find that the majority does not adequately address C.W.'s constitutional right of privacy, including the rights to bodily integrity and reproductive autonomy. Moreover, the record does not support the conclusion that all less drastic means of contraception are unworkable.

The Supreme Court of the United States has recognized a fundamental

constitutional right to privacy, which encompasses an individual's right to make autonomous decisions regarding reproduction. See, e.g., Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The Supreme Court has also held that an individual's fundamental right to privacy cannot be diminished due to that person's incompetence. Cruzan v. Missouri Department of Health, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990). Since a fundamental right is implicated in the decision to impose sterilization upon an individual, the state must demonstrate a compelling state interest before it may constitutionally deprive an individual of

that right. See, e.g., Eisenstadt v. Baird at 448, 92 S.Ct. at 1035, 31 L.Ed.2d at 359. If a less restrictive alternative is available that can achieve the same stated goal without depriving an individual of a fundamental right, it must be utilized. Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); In re Schmidt, 494 Pa. 86, 429 A.2d 631 (1981); Terwilliger, supra. The Majority fails to consider these constitutional issues.

Based on these sound constitutional principles, and the long history of eugenic sterilization of the mentally retarded in the United States, (see Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927)), courts in other jurisdictions, as well as our own, have held that sterilization of mentally retarded

individuals implicates a fundamental right and requires that we impose the least restrictive alternative in seeking contraceptive measures for those individuals. See, e.g., In the Matter of the Welfare of Hillstrom, 363 N.W.2d 871 (Minn. Ct. App. 1985); Conservatorship of Valerie N., 40 Cal.3d 143, 219 Cal. Rptr. 387, 707 P.2d 760 (1985); Wentzel v. Montgomery General Hospital, 239 Md. 685, 447 A.2d 1244 (1982), cert. denied, 459 U.S. 1147, 103 S.Ct. 790, 74 L.Ed.2d 995 (1983); Terwilliger, supra.

It is with these constitutional principles in mind that the trial court's decision to appoint a guardian with authority to consent to tubal ligation should be reviewed. The trial court, while stating that it was adhering to the principles set forth in Terwilliger,

actually rejects the fact that C.W.'s fundamental rights are at stake in this proceeding. In addressing this issue, the trial court stated, citing the opinion of Lord Hallsham in the English case of Re B, 2 All ER, 2 WLR 1213, FLR 314 (1987):

> To talk of the 'basic right' to reproduce of an individual who is not capable of knowing the causal connection between intercourse and childbirth, nature of pregnancy, what is involved in delivery, unable to form maternal instincts or to care for a child appears to me wholly to part company with reality.

Trial Court Opinion, February 28, 1990, at 56.

The trial court also spoke to the issue of the loss of a fundamental right in a case such as C.W.'s:

> The basic right to reproduce is meaningful only when such procreation is the result of informed choice. Certain retarded and mentally impaired individuals may be capable of making such a choice and their right to choose must be safeguarded. Because of organic brain damage and retarda-

> tion, [C.W.] is incapable of making such a choice. Thus, the loss of choice is the loss of an illusory right only.

Id. at 57-8.

The rationale of the trial court on the issue of C.W.'s fundamental right to privacy and bodily integrity is simple sophistry. This Court must adhere to the sound constitutional principle that these fundamental rights inure to all citizens and may be invaded only when there are no alternate means to protect the best interests of an individual.

Tubal ligation has not been established as the least restrictive nor as the only practicable means of contraception available to C.W. Therefore, I conclude that the trial court's Order violates C.W.'s fundamental rights of privacy and bodily integrity and should be reversed.

The majority does not faithfully apply these constitutional principles to the facts of this case. The majority acknowledges the constitutional dimension of this case, stating that the Terwilliger court recognized that a decision to sterilize an incompetent impinges on that person's fundamental right to procreate and involves an invasion of that person's bodily integrity. See Majority Slip Op. at 3. However, the majority's constitutional analysis ends with that acknowledgment. My colleagues abandon constitutional principles while failing to consider the effect of their decision upon C.W.'s fundamental rights.

Next, the majority concludes that sterilization is in C.W.'s best interests. They seemingly recognize that this determination ultimately depends upon a finding

that sterilization is the only practicable means of contraception, i.e., all less drastic contraceptive methods are unworkable and sterilization is the least significant intrusion necessary to protect C.W.'s interests. See Majority Slip Op. at 4, 16, 17, 27. However, I cannot agree that sterilization is in C.W.'s best interests because the record does not support a finding that sterilization is the only practicable means of contraception.

C.W. was a twenty year old woman at the time that this action was initiated. She suffers from organic brain damage. Experts who have evaluated C.W. agree that she has the mental age of a three to five year old child with an I.Q. of between 30-50. From the time she was twelve years old, C.W. has lived in a community living arrangement (a highly supervised group

residence) but she spends every other weekend and holidays visiting her mother at home. C.W. is active and communicates with her caretakers through the use of signing and other oral non-language communication.

C.W. is also epileptic. Although she receives high daily doses of three different anti-seizure medications, Phenobarbital, Dilantin, and Tegretol, C.W.'s epilepsy is not well-controlled and leaves her subject to intermittent seizure activity. C.W.'s caretakers monitor and administer all of C.W.'s medication. These same caretakers also check C.W. every 15 minutes during the day to insure her safety. At night, C.W. is checked less frequently but her room is equipped with a monitor by which the caretaker can be made aware of any sounds in C.W.'s room.

At trial, and again on appeal, the guardian ad litem contends that the record does not support the trial court's conclusion that laparoscopic tubal ligation is the least restrictive and the least intrusive alternative means of contraception for C.W. The guardian ad litem also maintains that C.W.'s mother has not proved by clear and convincing evidence that all other less intrusive methods of contraception are unworkable. I agree with these two contentions.

Most of the testimony in this case concentrated on the devastating effects that a full-term pregnancy could have on C.W. and compared the risks of pregnancy to the risks of a tubal ligation. The experts who testified agreed that pregnancy would be potentially harmful for C.W. and that the statistical risk

associated with sterilization is always less than pregnancy. This comparison, however, is both inappropriate and misleading for the resolution of the only issue before us. Once it has been determined, under Terwilliger, that C.W. is capable of becoming pregnant, that pregnancy is not in C.W.'s best medical and psychological interests, and that C.W. is incompetent to make choices about childbirth or contraception, the question then becomes: what is the least intrusive or restrictive method of contraception that can be used to prevent pregnancy?

The trial court rejected the birth control pill and other hormonal methods of contraception, concluding that they would not be in C.W.'s best interests. Hormonal medications such as birth control pills, Depo-Provera, and Delalutin were consider-

ed and rejected by the experts. However, these methods of contraception have not been proven to be unworkable by clear and convincing evidence, as is required under Terwilliger. On that basis, the guardian ad litem contests the trial court's rejection of hormonal methods of contraception. This contention is well-founded.

The experts put forth several reasons to support their conclusions that hormonal methods of contraception would not be in C.W.'s best interests. First, the experts indicated that since C.W.'s condition will not change over time, a permanent form of contraception should be employed in this case. The experts did not dispute the efficacy of hormonal methods of treatment nor did they dispute the fact that the use of hormonal treatments would be less intrusive than the tubal ligation that the

trial court ultimately authorized. The experts rely on the temporary nature of hormonal methods to reject them without a trial or any proof that they are in fact unworkable options for C.W.

The trial court also relied upon the permanent nature of tubal ligation to reject other less intrusive forms of contraception, stating: "[t]o ask that the Court review what, if any, form of contraception is appropriate, every year or two is to deny any remedy, as the process is extremely burdensome." Trial Court Opinion, supra, at 47. By rejecting trials of other methods of birth control based on the burdens which would be placed on the court, C.W.'s family, and her caretakers, the trial court specifically disregards the mandates of Terwilliger. Id. A decision to reject less intrusive methods of

contraception, and to impose sterilization upon an individual based upon these factors alone is specifically prohibited by Terwilliger. Terwilliger at 564, 450 A.2d at 1382.

I cannot accept the trial court's rationale that sterilization, because it is permanent, is in C.W.'s best interests. Under the eighth Terwilliger guideline, the trial court was required to assess the possibility of scientific advances in the area of contraception and sterilization prior to authorizing sterilization. Id. at 567, 450 A.2d at 1384. C.W. was twenty years of age at the time of the hearing, and all experts agreed that the use of hormonal medications should cease once C.W. is thirty-five. However, no expert was willing to rule out the possibility that new or safer methods of contraception

might be available when, in 15 years, C.W. would reach the age at which hormonal methods of contraception should be discontinued, based upon present medical knowledge. While C.W.'s contraceptive needs may be permanent, there is no evidence in the record that would support a finding that less intrusive methods of contraception will not serve her needs for the fifteen years immediately following the hearing. Sterilization now is not in C.W.'s best interests.

As a second rationale for rejecting hormonal methods of contraception, the experts also relied on the fact that birth control pills must be taken on a daily basis to be effective and that C.W. lacks the capacity to monitor the intake of her medications. All of C.W.'s medication is administered to her by her caretakers.

However, there was some concern regarding the possibility that C.W. might at some time in the future refuse to take her medication. Speculation about C.W.'s future behavior constitutes no rationale for imposing sterilization upon her, given the lack of any empirical data or other information concerning C.W.s response to taking an additional medication as part of her daily routine.

Third, the experts also expressed concern that since birth control pills, in particular, may cause side effects in some women, they should not be administered to C.W. because she may be unable to accurately communicate her symptoms to her caretakers. The record is clear, nevertheless, that while side effects are possible with the administration of birth control pills, they do not occur in most

women and can be detected by regular and conscientious medical care. See, e.g., N.T., August 17, 1989, at 75-6.

An earlier Orphans' Court case, In re Rubis, 4 Fiduciary 2d 412 (Phila. Comm. Pleas 1984) addressed this issue in the only published Pennsylvania opinion to impose the Terwilliger standard. In that case, the parents sought permission from the court to sterilize their daughter, Diane, who was a twenty year old incompetent woman functioning at the level of a nine month old infant. The court, under the Terwilliger guidelines, rejected the petition for sterilization where less intrusive methods of contraception were potentially available, despite the fact that Diane was unable to communicate her symptoms to her parents in any way, and despite her parents' fears about potential

side effects from the use of hormonal contraceptive agents. Id.

On the record before us, I am unable to conclude that the mere chance that side effects might develop constitutes a sufficient basis for rejecting a less intrusive method of contraception for C.W. in favor of sterilization. While C.W. is unable to use language, she is able to communicate her needs, wants and discomforts to her caretakers. The expert testimony also reveals that while the risk of side effects of birth control pills or other hormonal contraceptives may be present for C.W., as it is for any woman, frequent medical evaluations would allow C.W.'s physicians to detect any possible side effects from the use of these medications.

The fourth rationale advanced for the rejection of hormonal contraceptive

methods is that there is a possibility of an adverse interaction between C.W.'s seizure medications and birth control pills or other hormonal medications. The record establishes that the experts did not know what the interaction would be between C.W.'s seizure medications and any of the hormonal methods of contraception. Dr. Bolognese testified that he was "not aware of any good consistent report that implies or confirms that [C.W.'s] seizure disorder would be worsened by the use of birth control pills." N.T., August 17, 1989, at 75. While expert testimony indicated that a neurologist would be most qualified to speak to the issue of the possible interaction of hormonal contraceptive medications and C.W.'s seizure medications, the testimony of C.W.'s neurologist was not offered at the hearing before the trial

court. However, a letter from the neurologist, Dr. Elliott Schulman, was introduced into evidence as exhibit G-11. N.T., June 6, 1988, at 656-7. This letter only indicated that birth control pills might be an option for C.W., but the combined effect of her seizure medications and birth control pills was unknown. Id. The letter did not mention other hormonal contraceptive methods. Id.

Based on my review of this record, I must conclude that the proponents of sterilization have not satisfied their burden of proof. They have failed to produce detailed medical testimony showing that, to a reasonable degree of medical certainty, the sterilization procedure requested is the least intrusive means necessary to protect C.W.'s interests as is required under Terwilliger. While

maintaining that tubal ligation was in C.W.'s best interests, the court appointed expert, Dr. Bolognese, testified: "[c]ertainly it is not the least invasive. I think there are other methods that we have discussed that certainly are not invasive." N.T., August 17, 1989, at 87. Moreover, none of the experts testified that they believed "to a reasonable degree of medical certainty" that birth control pills or hormonal treatments are unworkable for C.W.

The most compelling evidence refuting the medical necessity of sterilization, based on C.W.'s epilepsy and use of seizure medications, was agreed to by all of the testifying physicians. Each stated that they would <u>not</u> <u>recommend</u> tubal ligation for a person of "normal" intelligence with C.W.'s medical problems and would

attempt to discourage such a person from pursuing such an option. Both gynecologists, Drs. Bolognese and Seitz, testified that they would not personally perform a tubal ligation on a "normal" woman of C.W.'s age, even if her medical problems were identical to C.W.'s. How then can we escape the obvious conclusion that the bodily invasion threatened here is being condoned not because it is the least intrusive means necessary, but because this is "good enough" for one with C.W.'s abnormalities?

Under Terwilliger, we are not permitted to engage in a balancing test between the available contraceptive measures and sterilization to decide which best suits the perceived needs of a particular patient and her family. Rather, Terwilliger prohibits this Court from affirming

the trial court's grant of a petition for sterilization of an incompetent individual unless all less drastic contraceptive methods are unworkable and expert medical testimony has shown that the sterilization procedure requested is the least significant intrusion necessary to protect the interests of the individual. Terwilliger at 566, 450 A.2d at 1383. On the record before us, one cannot reasonably conclude that the intrusion of a tubal ligation is minimal or that it provides the least restrictive alternative for C.W.

Absent clear and convincing evidence that all other methods of contraception are unworkable for C.W., this Court cannot uphold the trial court's authorization of C.W.'s sterilization.

Accordingly, I dissent. I would reverse the decree of the trial court and

remand for proceedings to insure that sterilization is not authorized before other practicable means of contraception are carefully considered, tried, and rejected under existing Pennsylvania law as the Terwilliger guidelines provide.

Del Sole, J. joins.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 02970 PHILADELPHIA 1991

ESTATE OF C.W., :
AN ALLEGED INCOMPETENT :
:
APPEAL OF: LORRIE McKINLEY, :
ESQ., GUARDIAN AD LITEM FOR C.W. :

Appeal from the Decree of the
Court of Common Pleas, Orphans Court
Division, of Philadelphia County,
at No. 3107 of 1987

BEFORE: ROWLEY, P.J., McEWEN,
DEL SOLE, BECK, TAMILIA,
POPOVICH, JOHNSON, HUDOCK
and FORD ELLIOTT, JJ.

DISSENTING STATEMENT BY HUDOCK, J.:

While I agree with much of the Dissenting Opinion of my learned colleague, Judge Johnson, I write separately in dissent because I agree with amici curiae and the dissenting judge on the en banc panel of the court below, Judge Bruno, that sterilization should not be considered where there is no evidence of

voluntary sexual activity. There is no such evidence here. Further, I would modify the third guideline of Terwilliger to eliminate all consideration of the likelihood that the incompetent who is not engaging in voluntary sexual activity might do so in the future and would further eliminate the likelihood that she might be sexually abused as a consideration. I agree with amici curiae that such sterilization as a means of protection can only encourage complacency in safeguarding individuals like C.W. who need constant care and projection, and with Judge Bruno, who wisely wrote:

> The protection of this woman's physical person from harm is the real issue in this case. Sterilization will not and cannot protect [C.W.] from untoward sexual advances and abuse. It can only prevent one of the unwanted results of sexual abuse and activity, pregnancy. What about

> the trauma of rape? What about the death sentence of AIDS and the horrors of syphilis?

Estate of C.W., O.C., No. 3107 of 1987, Slip Opinion at 2 (C.C.P. Phil., August 1, 1991) (Bruno, J., Dissenting).

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 02970 PHILADELPHIA 1991

ESTATE OF C.W.,
AN ALLEGED INCOMPETENT :

APPEAL OF: LORRIE McKINLEY,
ESQ., GUARDIAN AD LITEM FOR C.W. :

Appeal from the Decree entered August 1, 1991, Court of Common Pleas, Philadelphia County, Orphans' Court Division at No. 3107 of 1987.

BEFORE: BECK, JOHNSON and HUDOCK, JJ.

OPINION BY JOHNSON, J:

FILED MAR 17 1993

We are asked to determine whether the trial court properly appointed C.W.'s mother (Mother) as a guardian with authority to consent for C.W., a young woman with moderate to severe mental retardation, epilepsy and cerebral palsy, to a laparoscopic tubal ligation. A laparoscopic tubal ligation is a surgical

procedure in which the fallopian tubes are cauterized resulting in permanent sterilization. Since we conclude that the proponents of sterilization have not proven by clear and convincing evidence that other methods of contraception, such as hormonal treatments, education, training and supervision are unworkable for C.W., we vacate and remand for further proceedings.

C.W. was a twenty year old young woman at the time that this action was initiated. She suffers from organic brain damage. Experts who have evaluated C.W. agree that she has a mental age of a three to five year old child with an I.Q. of between 30-50. Since she was twelve years old, C.W. has lived in a community living arrangement (a highly supervised group residence) but she spends every other

weekend and holidays visiting Mother in her home. C.W. is active and communicates with her caretakers through the use of minimal signing and other oral non-language communication.

C.W. is also epileptic. Although she receives high daily doses of three different anti-seizure medications, Phenobarbital, Dilantin, and Tegretol, C.W.'s epilepsy is not well-controlled and leaves her subject to intermittent seizure activity. C.W.'s caretakers monitor and administer all of C.W.'s medication. These same caretakers also check C.W. every 15 minutes during the day to insure her safety. At night, C.W. is checked less frequently but her room is equipped with a monitor by which the caretaker can constantly be aware of any sounds in C.W.'s room.

All parties to this action agree that C.W. is probably capable of becoming pregnant and that a full-term pregnancy would not be in C.W.'s medical or psychological best interest. It is undisputed that C.W. is incompetent to make a decision regarding sterilization. It also remains uncontested that Mother had only the best of intentions in seeking the tubal ligation on behalf of her daughter.

It is also apparent to this Court that the parties to this action were, at all times, operating in good faith in this attempt to discern what is in the best interests of C.W. This Court also commends the trial court, the Honorable Judith Jamison, on the thorough and extensive deliberation given to this important issue, as is evidenced by the extensively developed record and the

lengthy consideration of the facts of this case contained in the trial court opinion.

This action was commenced when Mother filed a petition in the Orphan's Court seeking her own appointment as C.W.'s guardian with specific authority to consent to the performance of a tubal ligation upon C.W. The trial court appointed a guardian ad litem to represent C.W.'s interests. Mother and the guardian ad litem engaged experts to examine C.W. These experts addressed the issues of C.W.'s mental and physical health, as well as the issues of contraception and sterilization for C.W.

Hearings were held on March 22, April 14, April 15, May 12 and June 6, 1988, at which there was extensive testimony from witnesses called by both Mother and the guardian ad litem. The trial court also

personally interviewed C.W. in chambers. Following the initial hearings the trial court appointed an independent expert, Dr. Bolognese, Chairman of the Department of Obstetrics and Gynecology at Pennsylvania Hospital in Philadelphia, to examine C.W. and to testify as to his findings. Dr. Bolognese testified at a subsequent hearing held on August 17, 1989. A final hearing was held on October 4, 1989, at which Mother introduced additional testimony from witnesses who had previously testified, as well as testimony from new witnesses.

On February 28, 1990, the trial court granted Mother's petition and authorized Mother, as guardian for C.W., to consent to the sterilization of C.W. by laparoscopic tubal ligation. The guardian ad litem filed exceptions to the trial

court's order, which were denied by an en banc panel of the Orphan's Court, on August 1, 1991. This timely appeal followed.

In our determination of this issue, we are bound by the standard enunciated in In the Matter of Mildred J. Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1982). Our scope of review was clearly articulated in Terwilliger, where we stated:

> [B]ecause of the sensitive and irrevocable nature of a sterilization operation, we wish to make it clear that appellate review of the instant type of case will be of the broadest scope, and this Court will not be bound by the inferences or deductions of the lower court.

Id. at 568, 450 A.2d at 1384.

In making the decision whether to authorize sterilization, we may only consider the best interests of the incompetent and we are not permitted to consider whether a decision to sterilize

serves the interests or convenience of that individual's parents, guardian, or of society. Id. at 564, 450 A.2d at 1382. The proponent of sterilization must prove that sterilization is in the incompetent's best interest by clear and convincing evidence. Id. at 564, 450 A.2d at 1383.

The Terwilliger court further articulated three minimum requirements with which the trial court must comply before authorizing sterilization. First, the trial court should appoint a guardian ad litem, and insure that appropriate medical, psychological and social evaluations are made of the incompetent person, with evidence of these evaluations to be preserved in the record. Id. at 565, 450 A.2d at 1383. Second, the trial court must find that the individual lacks the capacity to make a decision about

sterilization and that the incapacity is unlikely to change in the future. Id. Third, the proponent of sterilization must prove that the person for whom sterilization is sought is capable of reproduction, and that sterilization is the only practicable means of contraception, i.e., all less drastic contraceptive methods, including supervision, education and training are unworkable. Id. Detailed medical testimony must show that the sterilization procedure requested is the least intrusive means necessary to protect the interests of the individual. Id.

The Terwilliger court set forth the following specific non-exclusive guidelines for the trial court under this third general requirement, citing In re Grady, 85 N.J. 235, 426 A.2d 467 (1981):

> (2) The possibility that the incompetent person will experience

trauma or psychological damage if she becomes pregnant or gives birth, and conversely, the possibility of trauma or psychological damage from the sterilization operation.

(3) The likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her.

(4) The inability of the incompetent person to understand reproduction or contraception and the likely permanence of the inability.

*** *** *** ***

(7) The ability of the incompetent person to care for a child, or the possibility that the incompetent may at some future date be able to marry and, with a spouse, care for a child.

(8) Evidence that scientific or medical advances may occur within the foreseeable future which will make possible either improvement of the individual's condition or alternative and less drastic sterilization procedures.

(9) A demonstration that the proponents of sterilization are seeking it in good faith and that their primary concern is for the best interests of the incompetent person rather than their own or the public's convenience.

ID. at 567, 450 A.2d 1384.

The last two of these requirements, under Terwilliger, are especially useful in assessing the guardian ad litem's allegations of error in this case:

> 1. Whether the trial court violated C.W.'s constitutional right of privacy, including the rights to bodily integrity and reproductive autonomy, by granting the petitioner's request for C.W.'s sterilization.
>
> 2. Whether the trial court erred in granting the petitioner's request for sterilization absent evidence that all less drastic means of contraception are unworkable.

We will now address the first of these issues. The Supreme Court of the United States has recognized a fundamental constitutional right to privacy, which encompasses an individual's right to make autonomous decisions regarding procreation. See, e.g., Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Eisenstadt v. Baird, 405 U.S. 438, 92

S.Ct. 1029, 31 L.Ed.2d 349 (1972); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The Supreme Court has also held that an individual's fundamental right to privacy cannot be diminished due to that person's incompetence. Cruzan v. Missouri Department of Health, 497 U.S. 261, 110 S.Ct. 2481, 111 L.Ed.2d 224 (1990). Since a fundamental right is implicated in the decision to impose sterilization upon an individual, the state must demonstrate a compelling state interest before it may constitutionally deprive an individual of that right. See, e.g., Eisenstadt v. Baird at 448, 92 S.Ct. at 1035, 31 L.Ed.2d at 359. If a less restrictive alternative is available that can achieve the same stated goal without depriving an individual of a fundamental right, it must be

utilized. Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); In re Schmidt, 494 Pa. 86, 429 A.2d 631 (1981); Terwilliger, supra.

Based on these sound constitutional principles, and a long history of eugenic sterilization of the mentally retarded in the United States, (see Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927)), courts in other jurisdictions, as well as our own, have held that sterilization of mentally retarded individuals implicates a fundamental right and requires that we impose the least restrictive alternative in seeking contraceptive measures for those individuals. See e.g. In the Matter of the Welfare of Hillstrom, 363 N.W.2d 871 (Minn App. 1985); Conservatorship of Valerie N., 40 Cal.3d 143, 219 Cal. Rptr. 387, 707 P.2d 760 (1985);

Wentzel v. Montgomery General Hospital, 239 Md. 685, 447 A.2d 1244 (1982), cert. denied, 459 U.S. 1147, 103 S.Ct. 790, 74 L.Ed.2d 995 (1983); Terwilliger, supra.

The trial court, while stating that it was adhering to the principles set forth in Terwilliger actually disclaims the fact that C.W.'s fundamental rights are at stake in this proceeding. The trial court in addressing this issue stated, citing the opinion of Lord Hallsham in the English case of Re B, 2 All ER, 2 WLR 1213, FLR 314 (1987):

> To talk of the 'basic right' to reproduce of an individual who is not capable of knowing the causal connection between intercourse and childbirth, nature of pregnancy, what is involved in delivery, unable to form maternal instincts or to care for a child appears to me wholly to part company with reality.

Trial court opinion at 56.

The trial court also spoke to the issue of the loss of a fundamental right in a case such as C.W.'s:

> The basic right to reproduce is meaningful only when such procreation is the result of informed choice. Certain retarded and mentally impaired individuals may be capable of making such a choice and their right to choose must be safeguarded. Because of organic brain damage and retardation, [C.W.] is incapable of making such a choice. Thus, the loss of choice is the loss of an illusory right only.

Trial court opinion at 57-58.

We are unable to uphold the rationale of the trial court on the issue of C.W.'s fundamental right to privacy and bodily integrity. This Court will continue to adhere to the sound constitutional principle that these fundamental rights inure to <u>all</u> citizens and may be invaded <u>only</u> when there are no alternate means to protect the best interests of an individual.

After a thorough review of the record, we are constrained to conclude that tubal ligation has not been established as the least restrictive nor as the only practicable means of contraception available to C.W. Therefore, we conclude that the order of the trial court violates C.W.'s fundamental rights to privacy and bodily integrity.

Second, the guardian ad litem contends that the record does not support the trial court's conclusion that sterilization by laparoscopic tubal ligation is the least restrictive and intrusive alternative for C.W. The guardian ad litem also maintains that the proponent of sterilization has not proved by clear and convincing evidence that all other less intrusive methods of contraception are unworkable. We agree with these two contentions.

Most of the testimony, in this case, concentrated on the devastating effects that a full-term pregnancy could have on C.W. and compared the risks of pregnancy versus the risks of a tubal ligation. The experts who testified agreed that pregnancy would be potentially harmful for C.W. and that the statistical risks associated with a tubal ligation were less for C.W. than those associated with carrying a pregnancy to term. Here, however, this comparison was not necessary for the resolution of the issue before us. Once it has been determined under Terwilliger, that C.W. is capable of becoming pregnant, that pregnancy is not in C.W.'s best medical and psychological interest, and that C.W. is incompetent to make choices about childbirth or contraception, the question then becomes: what is the least

intrusive or restrictive method of contraception that can be used to prevent pregnancy? It is this question that the guardian ad litem alleges was insufficiently explored by the trial court.

Expert medical testimony was presented to the trial court indicating that any sexual intercourse on C.W.'s part would essentially be non-consensual, as C.W. lacks the capacity to voluntarily engage in sexual activity. All expert testimony agreed that C.W.'s incapacity is permanent. It is also undisputed that no method of contraception has been tried in C.W.'s case.

The two obstetricians, Dr. Seitz and Dr. Bolognese, and C.W.'s family physician, Dr. Sternbach, all agreed that tubal ligation is the method of contraception which best serves C.W.'s interests.

However, while maintaining that tubal ligation was in C.W.'s best interest, the court appointed expert, Dr. Bolognese, testified: "[c]ertainly it is not the least invasive. I think there are other methods that we have discussed that certainly are not invasive." N.T., August 17, 1989, at 87. The medical experts advances several different reasons for choosing tubal ligation absent any trial of other less intrusive contraceptive methods. Barrier methods of medical contraception (i.e., diaphragm, condoms, sponge, foam) were eliminated as possibilities because they involve an awareness and an ability to plan for sexual intercourse and the knowledge that pregnancy is a possible result of sexual contact. All experts agreed that C.W. does not possess this awareness and understanding and is

unlikely to ever gain this cognitive ability. Intrauterine devices were rejected by the experts because they were not currently available on the market.

Hormonal medications such as birth control pills, Depo-Provera, and Delalutin were also considered and rejected by the experts. The guardian ad litem contests the trial court's rejection of hormonal methods of contraception because they have not been proven to be unworkable by clear and convincing evidence, as is required under Terwilliger. This contention is well-founded.

The experts put forth several reasons to support their conclusions that hormonal methods of contraception would not be in C.W.'s best interest. First, the experts indicated that since C.W.'s condition will not change over time, a permanent form of

contraception should be employed in this case. The experts did not dispute the efficacy of hormonal methods of treatment nor did they dispute the fact that hormonal treatments would be less intrusive than the tubal ligation that the trial court authorized. The experts and the trial court rely on the temporary nature of these treatments in order to reject them without a trial or any proof that they are in fact unworkable options for C.W.

The trial court also relied upon the permanent nature of tubal ligation to reject other less intrusive forms of contraception, stating: "[t]o ask that the Court review what, if any, form of contraception is appropriate, every year or two is to deny any remedy, as the process is extremely burdensome." Trial

Court opinion at 47. The trial court, specifically disregards the mandates of Terwilliger by rejecting trials of other methods of birth control, based on the burdens which would be placed on the court, C.W.'s family, and her caretakers. Trial court opinion at 47. To base a decision to reject less intrusive methods of contraception, and impose sterilization upon an individual, upon these factors is specifically prohibited under Terwilliger. Terwilliger at 564, 450 A.2d at 1382.

We are unwilling to accept the trial court's rationale that sterilization is in C.W.'s best interest because it is permanent. Under the eighth Terwilliger guideline, the trial court was required to assess the possibility of scientific advances in the area of contraception and sterilization prior to authorizing

sterilization. Terwilliger at 567, 450 A.2d at 1384. C.W. was twenty years of age at the time of the hearing in this case, and all experts agreed that the use of hormonal medications should cease once C.W. is thirty-five. However, no expert was willing to rule out the possibility that newer or safer methods of contraception may be available when, in 15 years, C.W. reaches the age at which hormonal methods of contraception should be discontinued, based upon present medical knowledge. While C.W.'s contraceptive needs may be permanent, there is no evidence in the record that would support a finding that less intrusive methods of contraception will not serve her needs for the next fifteen years. Absent evidence that no method of contraception will then be available for C.W.'s remaining

reproductive years, we cannot conclude that sterilization now is in C.W.'s present best interests.

As a second rationale for rejecting hormonal methods of contraception, the experts also relied on the fact that birth control pills must be taken on a daily basis to be effective and that C.W. lacks the capacity to monitor the intake of her medications. The record reveals that all of C.W.'s medication is administered to her by her caretakers. However, there was some concern regarding the possibility that C.W. might at some time in the future refuse to take her medication. We are constrained to reject speculation about C.W.'s future behavior as a rational for imposing a sterilization procedure upon her without sufficient information about what C.W.'s response would be to taking an

additional medication as part of her daily routine.

Third, the experts also expressed concern that since birth control pills, in particular, may cause certain side effects in some women, they should not be tried for C.W. because she may not be able to accurately communicate her symptoms to her caretakers. The record reveals that while side effects are a possibility with the administration of birth control pills, they do not occur in the majority of women and can be detected by regular and conscientious medical care. See, e.g., N.T., August 17, 1989, at 75-76.

This issue was addressed in an opinion by the Orphan's Court, in the only published Pennsylvania opinion to impose the Terwilliger standard. In re Rubis, 4 Fiduciary 2d 412 (Phila. Comm. Pleas

1984). In that case, the parents sought permission from the court to sterilize their daughter, Diane, who was a twenty year old incompetent woman functioning at the level of a nine month old infant. The court, under the Terwilliger guidelines, rejected the petition for sterilization where less intrusive methods of contraception were potentially available, despite the fact that Diane was unable to communicate her symptoms to her parents in any way, and despite her parents' fears about potential side effects from the use of hormonal contraceptive agents. Id.

While C.W. is unable to use language, she is able to communicate her needs, wants and discomforts to her caretakers on her own through the use of minimal signing and oral non-language communication. The expert testimony also reveals that while

the risk of side effects of birth control pills or other hormonal contraceptives may be present for C.W., as it is for any woman, frequent medical evaluations would allow C.W.'s physicians to detect any possible side-effects from her receipt of these medications. On the record before us, we are unable to conclude that the mere chance that side effects might develop constitutes a sufficient basis for rejecting a less intrusive method of contraception for C.W. in favor of sterilization.

The fourth rationale advanced for the rejection of hormonal contraceptive methods is that there is a possibility that there may be an adverse interaction between C.W.'s seizure medications and birth control pills or other hormonal medications. The record reveals that the

experts did not know what the interaction between C.W.'s seizure medications and any of the hormonal methods of contraception would be. Dr. Bolognese testified that he was "not aware of any good consistent report that implies or confirms that her [C.W.'s] seizure disorder would be worsened by the use of birth control pills." N.T., August 17, 1989, at 75. While expert testimony indicated that a neurologist would be most qualified to speak to the issue of the possible interaction of hormonal contraceptive medications and C.W.'s seizure medications, the testimony of C.W.'s neurologist was not offered at the hearing before the trial court. A letter from the neurologist, Dr. Elliott Schulman, was introduced into evidence as exhibit G-11. N.T., June 6, 1988, at 656-657. This letter unfortu-

nately only indicated that birth control pills might be an option for C.W., but the combined effect of her seizure medications and birth control pills was unknown. Id. The letter did not mention other hormonal contraceptive methods. Id.

However, the most compelling evidence refuting the medical necessity of sterilization, based on C.W.'s epilepsy and use of seizure medications, was given by all of the testifying physicians who stated that they would not only not recommend tubal ligation for a person with "normal" intelligence with C.W.'s medical problems but would attempt to discourage such a person from pursuing such an option. Both gynecologists, Drs. Bolognese and Seitz, testified that they would not personally perform a tubal ligation on a "normal" woman of C.W.'s age, even if her medical

problems were identical in nature to C.W.'s.

Under Terwilliger, we are not permitted to engage in a balancing test between the available contraceptive measures and sterilization to decide which best suits the perceived needs of a particular patient and her family. Rather Terwilliger prohibits this Court from affirming the trial court's grant of a petition for sterilization of an incompetent individual until all less drastic contraceptive methods, including supervision, education and training are unworkable and expert medical testimony has shown that the sterilization procedure requested is the least significant intrusion necessary to protect the interests of the individual. Terwilliger at 566, 450 A.2d at 1383. On the record before us, we are unable to

conclude that the intrusion of a tubal ligation is minimal or that it provides the least restrictive alternative for C.W.

Absent clear and convincing evidence that all other methods of contraception are unworkable for C.W., we will not uphold the trial court's authorization of C.W.'s sterilization. We, therefore, vacate the decree of the trial court and remand for proceedings not inconsistent with the guidelines of Terwilliger and this opinion.

Decree Vacated and Case Remanded.

Beck, J. files a Dissenting Opinion.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 02970 PHILADELPHIA 1991

ESTATE OF C.W.,	:
ALLEGED INCOMPETENT	:
	:
APPEAL OF: LORRIE McKINLEY,	:
ESQ., GUARDIAN AD LITEM FOR C.W.	:

Appeal from the Decree August 01, 1991, In the Court of Common Pleas of Philadelphia County, ORPHANS, No. 3107 of 1987

BEFORE: BECK, JOHNSON, and HUDOCK, JJ.

DISSENTING OPINION BY BECK, J.:

FILED MAR 17 1993

The issue presented in this case is whether a guardian with authority to consent to a tubal ligation should be appointed for C.W., a 24 year old woman who suffers from moderately severe retardation, grand mal epilepsy, cerebral palsy and scoliosis. The trial court determined that it was in C.W.'s best interest that

her mother be appointed as her guardian, with specific authority to consent to a laparoscopic tubal ligation for C.W. The majority finds that this determination was in error. I most strongly disagree.

The majority bases its finding of error not on a faithful application of the governing legal principles to the facts of this case, but rather on other considerations which, to my mind, should play no part in our decision. First, the majority construes certain comments in the trial court opinion as indicating that the trial court did not believe that C.W. had any fundamental right to privacy, including the right to make her own decisions concerning reproduction. The majority finds a basis for reversal in these comments by the trial court. I, on the other hand, do not view our function as an appellate

court as including the correction of every statement appearing in a trial court opinion. Even assuming that the majority has correctly construed the trial court's opinion, a point that I do not concede, we must nevertheless affirm the trial court if our analysis leads us to the conclusion that the trial court's decision is correct under the governing law. As this court has stated on so many occasions, we must affirm the trial court if its decision is correct on any ground, even if the rationale provided by the trial court itself is incorrect. Sparler v. Fireman's Ins. Co. of Newark, N.J., Pa. Super. , 521 A.2d 433, 436 (1987). In this case, nothing could be clearer than that the trial court's decision reflects an exceedingly careful consideration of the

voluminous record and is in accord with the law of this Commonwealth.

The majority also finds a basis for reversal in its construction of the expert medical opinions contained in this record. The majority concludes that these opinions do not establish that tubal ligation is the least intrusive or restrictive method of contraception that can be used to prevent C.W. from becoming pregnant and that hormonal treatments, such as the birth control pill, must be administered to C.W. in order to see what effect they have on her before they can be rejected as an alternative form of contraception. Moreover, the majority states that the record does not contain an adequate assessment of the possibility that scientific advances in the areas of contraception and sterilization may in the future

yield other alternatives that might prove workable for C.W.

I find absolutely no support for these conclusions either in the record before us or in the law. As the following thorough review of the record reveals, the expert medical opinions gathered by the trial court more than amply demonstrate the inadvisability of the use of the birth control pill for C.W. In fact, this record proves that any attempt to administer the pill to C.W. could have disastrous effects on her already tenuous physical condition. Further, the record clearly demonstrates that no expert who testified knew of any scientific advances on the horizon which would add to the alternatives available to C.W.

This case requires a searching inquiry into the facts pertinent to C.W.'s

mental and physical condition, expert opinion regarding the available medical and non-medical options, and the governing legal standards. I have performed this inquiry. My conclusion that the trial court did not err is mandated by the record and by the law.

I emphasize that in this case, we are not confronted with a legal tabula rasa. The standards governing a determination of whether sterilization of an incompetent is to be permitted were established in 1982 in In the Matter of Mildred J. Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1982), and my analysis applies to the legal principles established in Terwilliger to the facts of this case. [1] I add

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[1] While this case was pending on appeal, the Pennsylvania legislature enacted certain revisions to Title 20 (Decedents, Estates and Fiduciaries) of

that the majority's reliance on the decision of the Philadelphia Court of Common Pleas in In re Rubis, 4 Fidu. Rptr. 412 (1984), is misplaced. Terwilliger, and only Terwilliger, is binding on this court.

In Terwilliger, the father of a mentally retarded woman sought to have the court declare his daughter incompetent and to have himself appointed as her guardian for the purpose of consenting to her

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(footnote 1 continued)

the Pennsylvania Consolidated Statutes. 1992 Pa. Legis. Serv. 80 (Purdon). In part, these revisions relate to the appointment and powers of guardians of incapacitated persons. Although the revisions do not apply to the case before us, because here a guardian has already been appointed, id. at §§ 21, 22, I note that the revisions do confirm the jurisdiction of the court of common pleas, including the Orphans' Division, over the appointment of guardians and require that the court grant specific authority to a guardian to consent to a sterilization of an incapacitated person.

sterilization by tubal ligation. The trial court granted both requests. On appeal, a panel of this court reversed and remanded for further proceedings. The Terwilliger court first determined that the Orphans' Court had jurisdiction to grant the requested relief. [2] The court then proceeded to establish clear guidelines for the decision of such cases. The court began with the following cautionary statements:

> We caution that because sterilization necessarily results in the permanent termination of the intensely personal right of procreation, the trial judge must take the greatest care to ensure that the incompetent's rights are jealously guarded.
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> [I]n making the decision of whether to authorize sterilization, a court should consider only the best interest of the incompetent person, not the interests or convenience of

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[2] The jurisdiction of the court of common pleas to grant such relief is not at issue in this appeal.

> the individual's parents, the guardian or of society.

Id. at ---, 450 A.2d at 1382 (emphasis supplied).

Thus, the Terwilliger court recognized that a decision that an incompetent should undergo a sterilization procedure impinges on that person's fundamental right to procreate and involves an invasion of that person's bodily integrity.

With these principles in mind, the Terwilliger court made several procedural determination. First, the court found that given the fundamental right involved in such cases, the party seeking approval of the sterilization procedure had the burden of proof and that the standard of proof required was that of clear and convincing evidence. Id. Even more importantly, the Terwilliger court established that the crucial question to be answered

in such cases was whether the sterilization was in the best interest of the incompetent.

The court then required that a guardian ad litem be appointed to represent the interests of the incompetent at the hearing, that comprehensive medical, psychological and social evaluations be made of the incompetent, and that the trial court be permitted to appoint its own experts to assist in the evaluation of the incompetent. Further, the court stated that although the incompetent need not be at the hearing, the trial court should meet with the incompetent to form the court's own opinion as to competency and elicit any views regarding the sterilization that the incompetent would be able to express.

Having established these procedural ground rules, the Terwilliger court mandated two specific findings by the trial court as necessary prerequisites to authorizing the sterilization. First, the court must find that the individual lacks capacity to make a decision about sterilization and that the incapacity is not likely to change in the foreseeable future. Second, the court must find that the incompetent is capable of reproduction. If the court is able to make these findings, then the court must proceed to its ultimate determination, i.e., is sterilization in the incompetent's best interest?

Terwilliger viewed the best interest determination as ultimately depending on a finding that:

> sterilization is the only practicable means of contraception, i.e., all

> less drastic contraceptive methods, including supervision, education and training are unworkable and detailed medical testimony must show that the sterilization procedure requested is the least significant intrusion necessary to protect the interests of the individual.

Id. at --, 450 A.2d at 1383.

The Terwilliger court provided the following non-exclusive list of "guidelines", adopted from the decision of the Supreme Court of New Jersey in In re Grady, 85 N.J. 235, 426 A.2d 467 (1981), to assist the trial court in making this decision:

> (2) The possibility that the incompetent person will experience trauma or psychological damage if she becomes pregnant or gives birth, and, conversely, the possibility of trauma or psychological damage from the sterilization operation.
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> (3) The likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her.

> (4) The inability of the incompetent person to understand reproduction or contraception and the likely permanence of that inability.
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> (7) The ability of the incompetent person to care for a child, or the possibility that the incompetent may at some future date be able to marry and, with a spouse, care for a child.
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> (8) Evidence that scientific or medical advances may occur within the foreseeable future which will make possible either improvement of the individual's condition or alternative and less drastic sterilization procedures.
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> (9) A demonstration that the proponents of sterilization are seeking it in good faith and that their primary concern is for the best interests of the incompetent person rather than their own or the public's convenience.

Id. at ---, 450 A.2d at 1383-84 (quoting In re Grady, supra).

Despite the apparent specificity of these guidelines, the Terwilliger court wisely allowed the trial court latitude in making the ultimate determination of the best interests of the incompetent. Thus,

the court expressly stated that the list was not exhaustive, and that the weight to be accorded to each factor would appropriately vary in each case.

It is against this clear legal standard that we must judge whether it is in the best interests of C.W. that a guardian, with authorization to consent to a tubal ligation of C.W., be appointed. [3]

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[3] Amici curiae, Pennsylvania Protection & Advocacy, Association for Retarded Citizens--Pennsylvania, Association for Retarded Citizens--Allegheny County, American Civil Liberties Union of Greater Pittsburgh, and The Association for Persons with Severe Handicaps--Pennsylvania, argue that we should modify Terwilliger. Amici seek to have us require that no incompetent be sterilized unless the court has first found that there is clear and convincing evidence that the incompetent is already engaged in voluntary sexual activity. Amici urge that we eliminate all consideration of the likelihood that an incompetent who is not already engaging in voluntary sexual activity might do so in the future or of the likelihood that the incompetent may be sexually abused. This is in clear contravention of the Terwilliger standard.

As to the appellate court's standard of review, the Terwilliger court instructed:

> Additionally, because of the sensitive and irrevocable nature of a sterilization operation, we wish to make it clear that appellate review of the instant type of case will be of the broadest scope, and this court will not be bound by the inferences or deductions of the lower court.

Id. at ---, 450 A.2d at 1384.

I begin with a brief statement of the procedural history of this matter, followed by a general description of C.W.'s physical and mental disabilities, her personality and emotional nature, and her living arrangements and activities. I then proceed to a thoroughgoing review of

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(footnote 3 continued)

Even if I agreed that this would be a salutary change in the law, which I do not, in any event this court is not free to modify the legal standards set forth in Terwilliger.

the expert opinion testimony received by the trial court insofar as it is pertinent to each of the findings and guidelines identified in Terwilliger. Finally, I analyze all of this information in light of the dictates of Terwilliger.

PROCEDURAL HISTORY

This action was initiated in the Orphans' Court Division of the Court of Common Pleas for Philadelphia County through the filing of a petition by C.W.'s mother (sometimes hereinafter referred to as "petitioner"). Petitioner sought appointment as C.W.'s guardian, with specific authority to consent to the performance of a tubal ligation on C.W. As required by Terwilliger, the trial court appointed a guardian ad litem to represent the interests of C.W. Both the petitioner and the guardian ad litem

engaged numerous experts to examine C.W., to opine on her mental and physical condition and, more specifically, to address the subject of her best interests in regard to contraception and sterilization. Very early in the proceedings, the guardian ad litem took the position that performance of a tubal ligation was not in C.W.'s best interests.

Hearings were held on March 22, April 14, April 15, May 12 and June 6, 1988. At these hearings, extensive testimony from witnesses called by both parties was taken. The trial judge determined that it was not fruitful for C.W. to be present, in that she clearly could not participate and did not understand the proceedings. The trial judge did personally interview C.W. in chambers. After the completion of the initial hearings, the trial judge

determined that she needed additional expert testimony, and engaged the services of Dr. Bolognese, Chairman of the Department of Gynecology and Obstetrics at Pennsylvania Hospital. Further hearings were conducted on August 17, 1989, at which Dr. Bolognese testified. At the request of petitioner, additional testimony from certain witnesses who had previously testified and from certain new witnesses was taken at a final hearing on October 4, 1989.

On February 28, 1990, the trial court entered an order granting the petition and authorizing the petitioner to consent to the performance of a laparoscopic tubal ligation on C.W. The trial court accompanied its order by a 53 page opinion in which it reviewed the extensive testimonial and documentary evidence and analyzed

it under the Terwilliger standard. Exceptions filed by the guardian ad litem were denied by an en banc panel of the Orphans' Court and the trial court's order was made final by decree entered August 1, 1991. This timely appeal ensued. [4]

GENERAL BACKGROUND

C.W. is a 24 year old woman who has suffered since infancy from scoliosis, cerebral palsy, grand mal epilepsy and moderately severe retardation. Although the precise cause of her condition is not clear, it is agreed that her mental and physical disabilities are irreversible. Her seizure disorder is extremely severe. In some years of her life, C.W. has experienced over 50 seizures, some of

[4] As this recitation reveals, the trial court assiduously followed the procedural requirements of Terwilliger in its handling of this case. Neither party argues to the contrary.

which are severe and can last for over an hour. Every day she is administered three drugs, Phenobarbital, Dilantin and Tegretol, some in toxic doses, to control her epilepsy. Even this treatment is not fully effective. Any virus, infection or fluctuation in her temperature may affect her medications and cause her to have a seizure. Without medication, she could experience status epilepticus where she would seize repeatedly. Such attacks are known to be fatal.

The record reveals at least one specific example of the severity and instability of C.W.'s epileptic status. At one point in 1989, C.W.'s behavior became more aggressive and self-abusive. It was thought that her Dilantin level was too high and was possibly contributing to her behavior problem. Although her

neurologist was reluctant to do so, the Dilantin dosage was reduced. C.W. then experienced a severe seizure and her medication level had to be increased to a toxic level to stabilize her. Even at this level, C.W. seized again. C.W.'s primary physician identified this episode as a reminder of how difficult it is to control C.W.'s epilepsy.

C.W. suffers from organic brain damage and is mute. She communicates in a very limited fashion through minimal signing and making certain noises that those around her have learned to interpret. Experts who have evaluated C.W. agree that her mental age is in the range of a three to five year old and that her I.Q. is in the range of 30 to a possible high of 50.

Perhaps the best indication of who C.W. is can be gleaned from her inter-

action with the trial judge, who saw her in the courtroom at the beginning of the hearings in this matter and who later interviewed C.W. privately in chambers, as required by Terwilliger. When C.W. was in the courtroom, she was completely oblivious to what was happening around her. She reacted only when her name was spoken. She had with her a Sesame Street hand puppet, which she frequently waved at the judge. When interviewed, C.W. revealed a pleasant and affectionate nature. She hugged various people whom she had never before met. The trial judge described the session as follows:

> [C.W.] concentrated primarily on a Walkman tape. She signed that she had brought her nephew, Ricky, into this world, that girls differ from boys in that women carry purses. In response to questioning, she signed, without differentiation, that she would like to have a baby, that she would also like to have a puppy, that babies can be bought in a store and that her

> brother and sister-in-law had bought her nephew, Ricky. When asked to write her name, she wrote her first name. She willingly hugged everyone in the room, including a male court clerk who was called in to test her response to an unknown male. She did not know the differences between male and female. When asked how "babies get in tummies," she pointed to a necklace on a doll. She paid scant attention and drifted from any area on which the Court tried to focus her attention. She was able to write "dog" when shown a picture of the Judge's puppy and was able to distinguish between statuettes of a dog and a rabbit. She was extremely suggestible, compliant and anxious to please. Her affect was that of an uncommunicative pre-school child. It would have been futile and well beyond her ken to have discussed reproduction and contraception with her.

Trial Court Opinion, at 5-6.

C.W.'s legal residence is with her mother at her home in Philadelphia. However, since C.W. was twelve she has lived in a community living arrangement (a "CLA") operated by Ken Crest Centers, Inc. C.W. was placed in the CLA because she had

become increasingly difficult to control at home, sometimes refusing to eat or take her medications and disrupting the rest of the family. Although at the time of the hearings in this matter C.W. lived in a CLA in which a total of five disabled persons lived, it would appear that she is now living with only two other people. Every other week, C.W. spends her weekend at her mother's home. She also goes home for holidays. While there, she often visits her brother's home.

At the time of the initial hearing, C.W. was attending a life skills program at Northeast High School and on alternate weeks she attended Swenson Skills Center. During these proceedings, however, she graduated from her high school program and was to begin working in a sheltered workshop for the mentally disabled. It is

anticipated that, if sufficient funding is available, C.W. will continue to live in a CLA and go to the sheltered workshop.

In summary, C.W. has a mental age of between 3 and 5 and communicates on a subliminal level. Her physical disabilities, including epilepsy, cerebral palsy and scoliosis, mean that she lives in a fragile and unpredictable state.

REQUIRED PRELIMINARY FINDINGS

Capacity of C.W. to Make a Decision About Sterilization

C.W.'s inability to make a decision concerning her own sterilization is beyond dispute. C.W. has no understanding of sexual or reproductive functions. As the trial judge noted, C.W. cannot identify the differences between men and women. All the experts who testified at the hearing and rendered an opinion on this subject stated that C.W. is not competent to

given informed consent to a sterilization procedure or any other medical procedure, and never will be.

Reproductive Capability

Gynecological examination of C.W. revealed nothing that would indicate that she is incapable of reproduction. She has experienced normal development of her reproductive organs and has a regular menstrual cycle. Although C.W. has never been pregnant, all the experts qualified to express an opinion on this subject agreed that there was no reason to believe that C.W. was incapable of reproduction.

BEST INTEREST DETERMINATION

In analyzing the ultimate question of what is in C.W.'s best interest, we must consider, as did the trial court, the various factors enumerated in Terwilliger, as well as any other pertinent information

in the record. Several of the Terwilliger factors merit little discussion, since they are not subject to serious dispute.

First, addressing factor 2, the evidence squarely supports the trial court's conclusion that C.W. might well experience severe, even life threatening, trauma were she to become pregnant. In contrast, the possibility of trauma of psychological damage resulting from the proposed tubal ligation is minimal. Expert testimony revealed that although the physical effect of a pregnancy on C.W.'s epileptic status was unknown, it might well be extremely damaging. Dr. Seitz, a board certified gynecologist, testified as follows regarding the various predictable effects of a pregnancy on C.W.:

> [T]he old thought was a third of the patients with epilepsy becoming pregnant will experience more frequent seizures, a third will not be

> affected, and a third will actually improve.
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> Now, that's the better end of the scale. There are other studies that show from 45 to 50 percent of epileptics will be more seizure prone during pregnancy.
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> . . . .
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> ...so I think there is a distinct possibility of aggravating the condition with pregnancy. Pregnancy I think would be extremely traumatizing emotionally....
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> I think a therapeutic interruption of the pregnancy could well be extremely traumatic as well as carry with it the usual complications of perforation and hemorrhage and infection, ...

The other experts who testified on the question of the effect of a pregnancy on C.W., including Dr. Sternbach, C.W.'s primary physician, and Dr. Bolognese, the impartial expert who testified at the trial court's request, concurred in the view that pregnancy is highly inadvisable for C.W. The testimony revealed that

certain of the medications C.W. takes, and without which she might well die, are known to cause congenital defects in a developing fetus. Moreover, C.W.'s epilepsy could cause a spontaneous abortion or premature birth. Even if C.W. carried the pregnancy to term, it might be inadvisable to allow her to experience labor and delivery, because of the time and medication involved. A caesarean section, which is a major operative procedure, would then have to be performed. Lastly, the testimony of Dr. Heller, a board certified psychiatrist, was to the effect that a pregnancy could be psychologically traumatic for C.W., particularly in the unlikely event that she could carry the pregnancy to term and would then have to be separated from the child due to her inability to care for it.

In contrast, the expert medical testimony revealed that performance of a tubal ligation would be a relatively non-traumatic event for C.W. C.W. would not comprehend the nature or effect of the procedure on her ability to procreate. Nor would her menstrual cycle or feelings of femininity be affected. Therefore, there would likely be no psychological damage or behavioral effect. Regarding the physical nature of the procedure, the experts agreed that it involves a very small incision and is customarily performed on an outpatient basis, following which the patient returns home and is back to normal within 72 hours. The small incision is made in the area of the navel and is regarded as a minor procedure. Because of C.W.'s other problems, her procedure would be done on an in-patient basis, but

she would return home within a day or two after the procedure. The mortality rate is one to three in 100,000 and is generally related to the anesthetic. [5]

In sum, the record is clear that the risks and trauma associated with a pregnancy far outweigh the risks and trauma associated with a tubal ligation.

Second, addressing factor 4, the record overwhelmingly demonstrates that C.W. is incapable of understanding reproduction or contraception and that this situation is likely to be permanent.

Third, addressing factor 7, the record also overwhelmingly demonstrates

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[5] I opine more fully on the precise nature of a tubal ligation in a later section of this opinion where I consider in detail all of the various medical contraceptive and sterilization options available to C.W. I note that the majority opinion does not contain any analysis of the nature of a tubal ligation procedure, or of its effects on C.W.

that C.W. is incapable of caring for a child and that this situation will not change. C.W.'s mental and physical disabilities render her substantially incapable of caring for herself, let alone another person.

Fourth, addressing factor 8, and despite the majority's conclusion to the contrary, there is no evidence in the record that scientific or medical advances in the future will make possible a relevant improvement in C.W.'s own condition or that new sterilization techniques less "drastic" than those presently available will become available. The trial court explored this question fully and correctly found that there is no medical evidence that a cure for epilepsy is on the horizon, or that C.W.'s brain damage can ever be repaired. Nor was there any suggestion

by any expert that medical science is on the brink of developing a new contraceptive or sterilization technique that would have a materially different effect on a person in C.W.'s difficult mental and physical condition. Dr. Bolognese specifically testified that he was not aware of any such medical advances.

Lastly, addressing factor 9, the record strongly supports the trial court's conclusion that C.W.'s mother is acting in the interest of C.W. alone in seeking permission to have her sterilized. C.W.'s mother revealed only the greatest concern and affection for her daughter. She testified that her only desire was to improve the quality of her daughter's life and to protect her from any further pain. The trial court found the mother credible and found that she was not acting in her own

interest. [6] I further emphasize that, despite the majority's apparent continuing concern with the "long history of eugenic sterilization of the mentally retarded in the United States," this is not a case where the spectre of sterilization to prevent the birth of a "defective" child is raised. Only C.W.'s own best interests are at issue.

I may now proceed to consider the only two questions that are actually in dispute in this case in determining C.W.'s best interest. They are factor 3, the likelihood that C.W. will either voluntarily or involuntarily engage in sexual activity, and the overriding general requirement of Terwilliger, i.e., that the

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[6] We further note that C.W.'s father, who is now divorced from her mother, executed an affidavit in which he concurred in the mother's petition.

procedure proposed is the only practicable means of contraception. It is on these two factors that the guardian ad litem has based her opposition to the performance of a tubal ligation on C.W. Simply stated, the guardian has argued that C.W. is constantly monitored and is not now nor will she ever be at risk of pregnancy. Moreover, the guardian has argued that even if a risk of pregnancy is perceived, other contraceptive measures are preferable. The guardian has suggested the use of education and training or the birth control pill or other hormonal treatment.

The guardian ad litem has emphasized that in this Commonwealth, services to the mentally retarded are governed by the closely related principles of normalization and least restrictive alternative. As described by James McFalls, Director of

Residential Services at Ken Crest, who testified at these proceedings on behalf of the guardian ad litem, normalization requires that the environment provided to mentally retarded persons be as close as possible to the environment in which they would function if they had no handicap. The least restrictive alternative concept means that services are not provided to persons at a level that is more intensive or restrictive than is necessary for that person to live a normal life. These principles seek to preserve the rights of the mentally retarded to live full and meaningful lives and to grow and develop to their fullest potential, without unnecessary intrusion.

I recognize that these principles have been sanctioned in Pennsylvania. See In re Schmidt, 494 Pa. 86, 429 A.2d 631

(1981); Mental Health Procedures Act, 50 P.S. 7101 (Purdon 1976). Also, the holding in Terwilliger is consistent with these principles since Terwilliger requires that sterilization be ordered only when it is the only practicable means of contraception, and further requires that the procedure chosen is the least physically intrusive method available. The question presented to us is how these principles are to be implemented in C.W.'s life, specifically in connection with the issues of contraception and sterilization, so as to serve her overall best interests.

Extensive testimony was presented regarding the likelihood that C.W. will engage in sexual activity. At the outset, I note that there really are two questions posed in this regard. First, would C.W. engage in sexual activity voluntarily.

Second, could sexual activity be imposed upon her. I recognize that in one sense, any sexual intercourse with C.W. would be essentially nonconsensual, since it would appear that she is incompetent to give legally sufficient consent to sexual intercourse. My reference to voluntary sexual activity is meant to refer to intercourse without force, that is, wherein C.W., for whatever reason, would not attempt to resist.

The record supports the trial court's finding that C.W. might be willing to engage in voluntary sexual intercourse. There is no evidence that her sexual development has not proceeded normally. Furthermore, the record reveals she has an excessively affectionate nature and desires physical closeness. The record is full of references to C.W.'s affectionate

nature. More than one witness testified that C.W. appears to crave physical contact with others, including strangers. During C.W.'s interview with the trial judge, she indiscriminately hugged the judge's female law clerk and a male court employee C.W. had never seen before. During C.W.'s examination by Dr. Knast, a psychologist who evaluated her, she exposed her stomach to him and attempted to tickle his. Dr. Bolognese, the court appointed gynecologist who examined C.W., found her to be almost coquettish in demeanor. [7] The opinion of Ms. Lewin, a psychologist who examined C.W. at the

[7] Interestingly, Dr. Bolognese's physical examination of C.W. also revealed that she does not have an intact hymen. This was a fact previously unknown to C.W.'s mother or, apparently, any other person involved in her care. The record does not reveal any reliable explanation for C.W.'s lack of an intact hymen.

behest of the guardian ad litem, was aptly summarized by the trial court as follows:

> Ms. Lewin ... concluded that [C.W.] is not sexually active, has no awareness of sex, and her affectionate gestures are not indications of sexual interest. ... Ms. Lewis noted that when she asked permission of [C.W.] to touch her crotch, [C.W.] signed "OK" and emphatically "Yes." Ms. Lewin expressed her concern about [C.W.]'s vulnerability to being victimized and noted that the staff believes that if [C.W.] was left alone, she would go with anyone who was nice to her....
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> Ms. Lewin determined that [C.W.'s] sexual activity is limited to masturbation, that she understands the concept of masturbation and was able to demonstrate it. During a discussion of intercourse, [C.W.] gestured to Ms. Lewin that she engages in intercourse "all the time" and with every male she knows (her father, staff and CLA residents). She found that [C.W.] has an early adolescent awakening of feelings and fantasies, is keenly aware of her sexuality and femininity and uses both whenever possible, even where inappropriate. She engages in inappropriate touching, especially with strangers.

Trial Court Opinion, at 25-6.

The record also reveals that in mid-1989, when C.W. visited her primary physician, the physician's notes include a reference to a comment by the caretaker who brought C.W. to the appointment. The notes indicate that the caretaker stated that there had been "increased kissing involvement" between C.W. and her "boyfriend". The record does not state who the boyfriend is or what C.W.'s precise relationship with him is.

Clearly, the picture of C.W. that emerges from this record is of a young woman who might voluntarily engage in sexual activity without comprehending the nature of possible impact of such activity. Moreover, the possibility of C.W. being victimized by sex forcibly being imposed on her is a true risk. The question therefore becomes: how likely is

it, given the realities of C.W.'s living circumstances, that she actually would, either voluntarily or by force, engage in sexual activity?

In answering this question, we must examine the various approaches to preventing C.W. from becoming pregnant which the guardian ad litem has proposed. She concludes that supervision and education and training will be effective. The majority appears to endorse this view by stating at the very outset of its opinion that the record does not support a conclusion that supervision, education and training are ineffective methods of contraception for C.W. However, the majority does not support this conclusion with any discussion of the record evidence. In fact, beyond this bald conclusion, the majority engages in no further discussion of this issue at

all. I, on the other hand, find it necessary for us carefully to review the record to determine whether these approaches are or will be so effective that they will reduce the likelihood of C.W. engaging in sexual activity to a level that merits no further contraceptive measures in order to protect C.W. from the disastrous eventuality of pregnancy.

C.W. is presently closely supervised. She lives in a community living arrangement with other mentally impaired persons and a staff of several people. She is not permitted to leave the CLA alone. Because of her seizure disorder, she is checked every 15 to 30 minutes during the day. It appears from the record that she is not equally well supervised at night. One staff member at the CLA testified that only one staff member is on duty at night

and that she is not located on the floor where C.W.'s room is. also, that staff member is permitted to and sometimes does sleep during the night. Immediately prior to the first hearing in this matter, a small intercom box similar to that often used by people with young babies was placed in C.W.'s room so that staff could monitor noises from C.W.'s room while in other areas of the CLA.

When C.W. left the CLA to attend high school or the skills center, she went by school bus. The record is not clear as to how well supervised she was at the high school and skills center, nor is it at all clear what level of supervision will be provided at the sheltered workshop.

The testimony revealed that the 15 to 30 minute supervision provided C.W. when she is at the CLA is deemed medically

necessary and is more than is given to other residents. The trial court heard a great deal of testimony as to whether this level of supervision was adequate to safeguard C.W. from pregnancy. The court concluded it was not and I find substantial support in the record for the court's conclusion. The expert testimony was in conflict. Experts called by petitioner uniformly found this level of supervision inadequate, noting that much can be accomplished that can cause pregnancy in less than 15 minutes. Experts called by the guardian ad litem felt that the level of supervision was adequate, reducing the possibility of pregnancy to a very low level, although admittedly not eliminating it. Dr. Bolognese, called by the trial court, agreed with those who testified on behalf of the petitioner and was reluctant

to conclude that supervision was sufficient to prevent C.W. from becoming pregnant.

The record does not support the guardian ad litem's conclusion that C.W. is "never alone". C.W. is sometimes alone. This record contains specific testimony regarding the fact that during the day C.W. is left alone in her room at her CLA for periods of 15 to 30 minutes and that in all likelihood at night she is left alone for considerably longer periods of time. C.W.'s mother testified that she initiated this proceeding because she was concerned that C.W. was not being supervised closely enough to protect her from the possibility of pregnancy. Her mother specifically related two incidents that gave rise to this concern. The first involved a situation where C.W. was on a

picnic at Penn's Landing with others from her CLA and was permitted to go to the public ladies' room by herself. The second related to a time when C.W.'s mother was visiting the CLA and observed a young male resident of C.W.'s CLA standing in C.W.'s bedroom door watching C.W. undress.

The record also contains specific evidence of what has happened to C.W. when she was left alone. On March 13, 1989, C.W. was in her room at the CLA. The staff person on duty was in the basement. She came up and heard a noise on the monitor coming from C.W.'s room. She then noticed the light in C.W.'s hall was out and saw a male resident of the CLA running from C.W.'s room. She went into C.W.'s room and found C.W. on her bed with her nightgown pulled up. C.W. was visibly

upset and signed to the staff member that the male resident had touched her, pointing to her breasts, waist and pubic area.

In light of the above record evidence, I find the trial court was correct in rejecting the guardian ad litem's argument and in concluding that the level of supervision that has been given to C.W. up to now, which has been deemed medically sufficient by all those who care for her, may well be insufficient to protect her from sexual activity. [8] Thus, if

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[8] I reject the guardian ad litem's argument that the supervision level accorded to C.W. up to now has proven itself to be effective since there is no indication that C.W. has yet engaged in sexual activity. The fact is, no one knows whether she has engaged in sexual activity and, even if she has not, certainly no one knows whether she will in the future. Terwilliger does not require that we wait until there is actual proof of sexual activity before action is taken to protect the incompetent from it. Terwilliger requires that we assess, inter alia, the likelihood of sexual activity.

supervision is to be relied upon as the sole contraceptive device to be provided to C.W., the level of supervision will have to increase. C.W. could not be permitted to be alone and she could not have any degree to personal freedom. In such an environment she could not develop and grow with the same freedom that she otherwise might have. Clearly, such an approach is extremely restrictive and runs completely contrary to principles of normalization and least restrictive alternative.

The guardian ad litem also argues that education and training, coupled with the present level of supervision, is

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(footnote 8 continued)

The fact that there is no evidence of sexual activity to date does not definitely prove that there will be none in the future.

adequate to protect C.W. from becoming pregnant. The record reveals that C.W.'s capacity for absorbing education and training is severely limited. C.W. has twice received education and training in the areas of behavior management, appropriate social interaction and sexuality, including the basics of reproduction and the difference between male and female bodies. Several years ago, C.W. was given "good-touch - bad touch" training to assist her in protecting herself against physical abuse. By the time the trial court interviewed C.W. in 1988, she had completely forgotten these lessons. As I have stated, she continued not only to be willing to have physical contact with strangers, but actually to seek it. She had not learned the difference between appropriate and inappropriate social

behavior and could not indicate the differences between male and female bodies.

In 1989, during the pendency of these proceedings, training of C.W. in these areas was reinitiated. C.W.'s behavior had deteriorated. She had become uncooperative and engaged in self-abusive behavior such as biting and scratching herself. A behavior modification program was instituted. A sexuality consultant visited the CLA and provided training to the residents of the CLA once a month. Staff at the CLA reinforced these lessons in between the consultant's visits. Specifically, C.W. was given a form of training called "Circles," in which she was taught the appropriate manner of behaving with people who stood in various relationships to her, from stranger to friend to relative. The testimony at the

hearings in 1989 indicated that C.W.'s behavior had improved and that she was retaining some of the information concerning appropriate social behavior.

Several of the experts who testified on behalf of the guardian ad litem stated their belief that C.W. is capable of learning the difference between appropriate and inappropriate social behavior. They opined that such training will render her less vulnerable to attack and less likely to engage in voluntary sexual activity.

Other experts were less sanguine. Dr. Heller, a psychiatrist called by the petitioner, did not believe that training would be effective in materially increasing C.W.'s comprehension of appropriate social behavior because her learning abilities are substantially impaired by

irreversible neurological damage. Dr. Knast, another psychiatrist who testified for petitioner, found that C.W. has difficulty in understanding the consequences of behavior. Although Dr. Knast did not rule out some improvement in C.W.'s behavior and understanding, he opined that it would take at least two to three years for her to develop the communication skills necessary for behavior modification.

I have carefully considered the evidence concerning the effectiveness of educating C.W. I concur in the trial court's finding that education is not the answer. Even accepting that C.W.'s present training program has shown some results, it is simply a fact that no amount of training can protect C.W. from physical abuse. Moreover, from this record I cannot conclude with any degree

of confidence that C.W., with her substantial neurological damage, can be educated not to engage in voluntary sexual activity, given her apparent natural desire to have physical contact with those around her. C.W., at the age of 20, could still only write her first name, could not be separated from her Kermit the Frog puppet, thought that babies could be purchased at the store and was willing to have physical contact with total strangers. Her ability to learn and retain information and to modify her behavior is very limited.

I also concur in the trial's court's recognition of the fact that no court can guarantee that C.W. will receive all the education and training that she would need to increase her ability to understand and deal with sexuality. If such programs are in fact so readily available, so easily

funded and so clearly effective, I wonder why they have not already been provided to her and why she has not already demonstrated her capacity to learn and retain the information conveyed. She is now 24. She has lived in her CLA since she was 12 and, in all likelihood, she has been capable of reproduction for almost a decade. It is particularly telling that when the trial judge interviewed C.W. in 1988, she was still completely incapable of comprehending anything about reproduction or sexuality or of controlling her own behavior.

Although the guardian ad litem opposed any medical means of contraception or sterilization, arguing that none of these options were at all necessary to eliminate the possibility of C.W. becoming pregnant, the guardian also argued that if

a medical approach were deemed necessary, then methods short of tubal ligation were preferable. The medical options are: 1) barrier methods, such as an IUD or diaphragm; 2) hormonal treatments, such as Depo-Provera; 3) the birth control pill; and 4) tubal ligation. [9]

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[9] The guardian ad litem also argued that abortion should be considered as a method of dealing with the eventuality of C.W. becoming pregnant. The guardian argued that a first trimester abortion would be only as physically intrusive as a tubal ligation. The trial court rejected this alternative, and I find no error in the court's reasoning. I add only my additional observation that from this record, I cannot conclude that a pregnancy would be detected early enough to ensure a first trimester abortion. Nor am I confident that even if detected in time, the necessary court approval for such a procedure would be obtained within the first trimester of pregnancy. C.W. would then be exposed to the more traumatic procedure of a second trimester abortion, and would perhaps already have suffered from some of the physically disastrous effects of pregnancy on her epileptic condition.

There was substantial agreement among the medical experts as to the relative advantages and disadvantages of each alternative. [10] In reviewing the testimony I have focused on the intrusiveness, risks and effectiveness of each alternative. In doing so, I have followed the dictates of Terwilliger. Terwilliger requires that we choose the least intrusive approach, but also requires that we find that the method chosen is the only practicable means of contraception for the incompetent. Thus, the Terwilliger standard recognizes that the effectiveness of the method chosen is a legitimate concern. Further, I have particularly considered

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[10] All of these witnesses were called by either the petitioner or the trial court. The guardian ad litem did not call a doctor to contradict the medical testimony on this issue.

the medical risks posed to C.W. by each alternative.

Barrier methods were not recommended by any witness. Most such methods would require C.W. to be responsible for her own contraception, which is clearly beyond her capability. Any such method is impracticable in C.W.'s case. The IUD, which is placed by a physician, presents a risk of infection or perforation and must be replaced every year. The risks posed by an IUD are too great, and the necessity of a medical procedure every year is too intrusive and may make it more intrusive than tubal ligation.

The sum and substance of the testimony of the experts regarding the hormonal treatments was that none of them have been widely enough used as contraceptive devices in this country for any expert to

know for sure what risks they might pose to C.W. given her substantial physical problems.

The third option is the birth control pill. The guardian ad litem has argued that if any medical contraception is deemed necessary, the pill should be given serious consideration. I have done so. I agree with the guardian that the pill is extremely effective, is easily administered and requires no surgical procedure. I do not agree, however, with the guardian ad litem's last argument in favor of the pill.

This argument rests upon a letter from C.W.'s neurologist, Dr. Elliott A. Schulman, to the guardian. While Dr. Schulman was not called to testify, this letter was admitted into evidence. The letter apparently responds to an inquiry

the guardian had put to Dr. Schulman, i.e., whether C.W. could receive general anesthesia in order to have a tubal ligation and whether she could be given the birth control pill. In the letter, Dr. Schulman states:

> Some patients have increased seizure frequency, others have decreased seizure frequency and some have no change while on birth control pills. This might be an option worth considering if you are hesitant putting her under general anesthesia.

The guardian ad litem considers this letter to be a statement by Dr. Schulman that the birth control pill is a "viable option" for C.W. Clearly, the guardian views Dr. Schulman as having endorsed the use of the birth control pill for C.W. I do not agree. All I view Dr. Schulman's somewhat cryptic letter as stating is that the pill is an option to be considered and

that its likely effect on C.W.'s seizure disorder is not known.

The experts who actually testified regarding giving the pill to C.W. unanimously opposed it. They cited the following possible difficulties:

> 1. The birth control pill is not administered to women over the age of 35 and, therefore, it is not even potentially a permanent contraceptive approach. Since it is not expected that C.W.'s condition will materially change, a potentially permanent solution is preferable.
>
> 2. The birth control pill can cause side effects in any woman. Some of these may indicate that more serious problems, like thromboembolic disease, are developing. If C.W. experiences such symptoms, she may not be capable of communicating that fact so as to enable the doctors to stop administering the pill or take other appropriate action.
>
> 3. Although the pill would be given to C.W. by her caretakers, if she refused to take her medications, as she has sometimes done in the past, the pill would be rendered totally ineffective.

4. The interaction of the pill with C.W.'s seizure medication is not known -- use of the pill may require readjustment of those medications, which are already difficult to establish at levels sufficient to control C.W.'s seizures.

Giving due recognition to the fact that the pill is less physically intrusive than a tubal ligation, the trial court gave this option serious consideration. I agree with the trial court that use of the birth control pill would not be in C.W.'s best interests. The well-considered opinions of the medical experts reveal that the experts were concerned with the possible effect of introducing another strong medication into the existing array of medications C.W. already takes every day. C.W.'s seizure disorder is just barely manageable as it is. Her two severe seizures in 1989 are stark evidence of that fact. I see no reasons to inject

a new element that may further destabilize her, particularly where that element is unquestionably only a temporary solution to a problem that in all likelihood is permanent.

Next I assess the trial court's conclusion that tubal ligation is in C.W.'s best interest. The testimony of Dr. Seitz and Dr. Bolognese, both of whom are gynecologists and obstetricians with excellent qualifications and both of whom have performed hundreds of tubal ligations, described two types of tubal ligation, either of which could be performed on C.W.

Dr. Seitz recommended a mini-laparoscopy in which the fallopian tubes are cauterized in one section. The incision required is very small and post-operative discomfort is minimal. Most such procedures are done on an out-patient basis,

although C.W. would have to be hospitalized to ensure that she is adequately medicated prior to surgery and to monitor her recovery thereafter. The risk of failure is one in 300 and the mortality rate is 3 in 100,000. There is no significant risk of complications. Most interestingly, the procedure is not permanent and, therefore, is not actually "sterilization" as that word has traditionally been understood. In eighty percent of the cases, this form of tubal ligation is reversible. The tubes are simply rejoined in a relatively minor surgical procedure.

Dr. Bolognese performs a different form of laparoscopic tubal ligation in which the fallopian tubes are cauterized at three locations. The recovery period and discomfort level is the same, and the

failure rate is four in 1,000. Dr. Bolognese stated that if the procedure is done by an experienced practitioner, there is a minimal risk of complications. This procedure is not reversible, but neither does it interfere with a woman's ability to conceive through in vitro fertilization.

I agree with the trial court that tubal ligation by laparoscopy is beyond any doubt the option that best serves C.W.'s medical and psychological interests. The procedure is not a dangerous operation and is not overly intrusive since it requires only a small incision into the area of the navel. It is extremely effective in contraception and it does not totally preclude C.W. from conceiving a child in the future in the very unlikely event that she is ever

desirous or capable of having and caring for a child. [11] C.W. will not experience any reduction in her feelings of femininity or in her menstrual cycle. No psychological damage or behavioral modification is expected to result from the procedure since C.W. cannot comprehend the

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[11] Unlike the situation that appears to have been presented to the Terwilliger court, where the tubal ligation procedure proposed was irreversible and no alternative means of conception was possible for Ms. Terwilliger, we are not here presented with such a limited field of choices. The ten years since Terwilliger have seen the development of a highly reversible form of tubal ligation. In addition, even in the case of an irreversible tubal ligation, conception is not out of the question. Medical science has developed the in vitro fertilization procedure and is constantly perfecting new methods of enabling women to conceive despite severe damage to their fallopian tubes. There is no reason to believe that such efforts will not continue in the future. In determining that C.W.'s best interests are presently served by the performance of a tubal ligation, I have taken note of these advancements in medical science.

nature or effect of it on her ability to reproduce.

In determining the best interests of C.W., the trial court deliberated long and hard and decided in favor of allowing a tubal ligation to be performed on C.W. I have carefully examined the trial court's findings and reasoning and I am confident that all the information that is pertinent to the decision was before the trial court. In the end, the evidence demonstrates that despite the best efforts of all concerned to guard and educate C.W., the possibility of sexual activity and pregnancy does exist. No one can assess with precision how likely that eventuality is. We can, however, assess the possible impact of a pregnancy on C.W., and I assess that impact as being completely negative and perhaps disastrous.

Therefore, her best interests require that she be protected against that eventuality. Anything short of tubal ligation requires experimenting with various contraceptive medications that may cause her to experience more seizures, more pain and discomfort. When the alternative medical procedures are weighed against tubal ligation, a relatively simple and extremely effective procedure, I find the trial court did not err.

The intrusion is minimal and does provide the least restrictive alternative. Other medical interventions bring with them both known and unknowable dangers. Non-medical alternatives such as supervision and education are not realistic alternatives. Given C.W.'s limited mental capacity, education is a non-viable alternative. Total supervision is equally

impossible and, if possible, would be overly intrusive. Such an approach would be extremely restrictive on C.W.'s person. The goal of seeking the least restrictive alternative is to permit C.W. to lead as close to a normal life as she is capable of living. Normalization is presumed to be in C.W.'s best interest. Normalization cannot be achieved by subjecting C.W. to prison-like supervision or to dangerous experimentation with drugs.

Both sides agree that pregnancy would be most unfortunate, and perhaps even fatal. Everyone also agrees that C.W.'s physical condition is irreversible. Although the right to procreate is fundamental, it is undeniable that the exercise of that right by C.W. would be disastrous. Normalization and the best interest of C.W. requires that she does not exercise

that right. The least restrictive alternative for C.W. is tubal ligation, which is a simple and relatively safe procedure. It clearly is in her best interests.

The trial court order should be affirmed.

Supreme Court, U.S.
FILED

(3) 94 892 NOV 15 1994

No. _____

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

C.W., By Her Guardian Ad Litem,
Loralyn McKinley, Esquire, Petitioner,

v.

Dolores Wasiek, Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of Pennsylvania

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA PART II

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Orphans' Court Division
Court of Common Pleas of Philadelphia

O.C. NO. 3107 of 1987

Estate of CYNTHIA WOJCIECHOWSKI,
an alleged incompetent

D E C R E E

AND NOW, this 1st day of August, 1991, the Exceptions filed by Lorrie McKinley, Esquire, Guardian ad litem, to the Order and Opinion of Jamison, J. dated February 28, 1990 are dismissed, and the Order is affirmed.

Bruno, J. dissents and files a dissenting Opinion.

BY THE COURT:

Pawelec, A.J.
Administrative Judge

Lorrie McKinley, Esquire
Guardian ad litem
Exceptant

Marta Engdahl, Esquire

Orphans' Court Division
Court of Common Pleas of Philadelphia

O.C. NO. 3107 of 1987

Estate of CYNTHIA WOJCIECHOWSKI,
an alleged incompetent

Before: PAWELEC, ADM. J., BRUNO, BONAVITACOLA, JJ. and KLEIN and GUTOWICZ, Senior Judges (Specially Presiding)

OPINION SUR EXCEPTIONS

PAWELEC, ADM.J. Aug. 01, 1991

Dolores Wasiak, the mother of Cynthia Wojciechowski (hereinafter referred to as Cynthia) filed a petition seeking to have Cynthia declared incompetent, herself appointed as guardian of the person of Cynthia and authorization for herself as guardian to consent to a laparoscopic tubal ligation for Cynthia. After extensive hearings, the hearing judge granted the relief requested. Exceptions to the

decree were filed by the guardian ad litem appointed by the hearing judge to represent the interests of Cynthia. They are presently before the court for disposition.

In her exceptions, the guardian ad litem contends that the order and opinion of the hearing judge contravene the mandate announced In Re Terwillinger, 304 Pa. Super 553, 450 A.2d 1376 (1983) and are violative of the constitutional rights of bodily integrity and reproductive autonomy afforded Cynthia by the Fourteenth Amendment of the United States Constitution. In essence, exceptant argues the petitioner failed to prove by clear and convincing evidence that laparoscopic tubal ligation is necessary for the welfare of Cynthia, that less intrusive methods of contraception were unworkable,

and that a tubal ligation is the only practicable alternative.

Our usual scope of review is delineated in Estate of Dembiec, 468 A.2d 1107 (Pa. Super 1983), at p. 1110, wherein the court stated:

> On appeal, the findings of an Orphans' Court Judge who hears testimony without a jury are entitled to the weight of a jury verdict....This rule is particularly applicable "to findings of fact which are predicated upon the credibility of the witnesses, whom the Judge has had the opportunity to hear and observe, and upon the weight given to their testimony."...In reviewing the Orphans' Court findings, our task is to ensure that the record is free from legal error and to determine if the Orphans' Court findings are supported by competent and adequate evidence and are not predicated upon capricious disbelief of competent and credible evidence.... However, we are not limited when we review the legal conclusions that Orphans' Court has derived from those facts. (Citations omitted).

However, we note that In Re Terwilliger, supra, the Superior Court stated that

on appeal, review in a case of this nature should be of the broadest scope and the reviewing court need not be bound by the inferences or deductions of the hearing judge. We determine these exceptions in accord with this direction.

The hearing judge, in her comprehensive opinion, extensively reviewed and analyzed the testimony and the evidence of both sides. We see no reason to duplicate her review and analysis.

For the purpose of the creation of a self-sustaining document, we reiterate that the following medical evidence is uncontested. Cynthia has an emotional and intellectual age of three to five years. She suffers from cerebral palsy, scoliosis and grand mal epilepsy seizures (n.t. pp. 9-12). As a result of her medical condition, she takes various medications.

Despite the medication, her seizure disorder is very tenuous, not very stable and not easily controlled. According to the medical testimony, her condition is irreversible.

Based on Cynthia's history, the medical experts were in agreement as to the detrimental effects of pregnancy. The medical testimony indicated that there were several possible theoretical medical alternatives to prevent pregnancy, but concluded that the risks were too great to choose any of these alternatives. The guardian ad litem failed to present any contrary evidence in regard to the stated medical problems and dangers to Cynthia were she to become pregnant. The social workers and psychologists who testified focused on alternative methods of contraception and suggested that constant

surveillance would prevent pregnancy. In the event of an unexpected pregnancy, abortion or adoption were offered as possible solutions.

When alternatives were presented to the medical experts testifying on behalf of the petitioner, they were rejected as neither viable nor in Cynthia's best interests.

Cynthia's mother, Mrs. Dolores Wasiak, was called as a witness. Although Cynthia's legal residence is with her mother, she has resided in a Community Living Arrangement (hereinafter referred to as C.L.A.) since she was 12 years old. Mrs. Wasiak stated that her reason for filing this petition was that Cynthia is getting older and is a very affectionate child with a myriad of medical problems,

and that a pregnancy would be very harmful to Cynthia.

No one has indicated that Mrs. Wasiak has any interest adverse to Cynthia throughout these proceedings.

Upon completion of testimony and after a review of the divergence of opinion as to whether tubal ligation was an appropriate method of contraception herein, the trial judge appointed Dr. Ronald J. Bolognese as an impartial witness in this matter. The guardian ad litem objected to Dr. Bolognese's appointment. The appointment of an impartial medical expert is in accordance with the findings in Terwillinger. The court permitted petitioner the opportunity to introduce supplemental evidence of changed circumstances regarding Cynthia's

behavioral changes and of a particular incident which occurred at the C.L.A.

In this regard, the testimony of Mrs. Wasiak indicated that because of certain serious behavioral problems of Cynthia, a behavior modification treatment was instituted. Cynthia's Dilantin dosage had been reduced but had to be restored and then increased because of two severe seizures. In addition, in March of 1989, a male C.L.A. resident was seen leaving Cynthia's bedroom. On review, we conclude it was not only appropriate but necessary for the trial judge to allow this testimony of changed circumstances. The court correctly stated that from the date the petition was filed, Cynthia became a ward of the court and any information of a substantial nature which bore upon the prayer of the petition should be heard by the court.

Dr. Bolognese, Chairman of the Department of Obstetrics and Gynecology at Pennsylvania Hospital was called as the court's impartial witness. Dr. Bolognese is an obstetrician whose area of specialty is high risk pregnancy and whose medical credentials are impeccable. He testified that in his expert opinion, Cynthia should never conceive unless her medical condition drastically changes during her reproductive age bracket. He ruled out hormonal therapy (as a contraceptive means) by daily use of birth control pills or even weekly ingestion of other types of medication because of potential mixed reactions to Cynthia's seizure disorder. Dr. Bolognese further stated that the risk complications arising as result of a tubal ligation were minimal and that, in fact, the risk of material death, secondary to

an abortion, is the same. Dr. Bolognese further states, however, that in his opinion, the issue inherent in a pregnancy and in tubal ligation were vastly different.

Mr. McFalls, the Director of Ken Crest's residential services, admitted that the C.L.A.'s policy of checking on Cynthia every 15 minutes to half hour was instituted as much for the purpose of preventing Cynthia from engaging in sexual activity as it was for monitoring her seizures.

This court makes no comment upon the correctness of such an approach. It is not within the purview of this court upon review to adjudicate whether sexual activity should or should not be permissible for this unfortunate woman. The trial court reviewed the evidence thoroughly and

did not abuse its discretion in reaching the conclusion stated in the record.

In reviewing the guardian ad litem's objections, it appears that the ad litem has misinterpreted the standard applicable to the case in question. The issue is not whether sterilization is the least restrictive means of birth control in general, but rather, considering Cynthia's medical condition, what type of birth control provides the least intrusion into Cynthia's life and does not subject her to unnecessary risk of her life or health?

The instant case does not present the facts which were before the court in Terwilliger, supra. In Terwilliger, the court was faced with a situation wherein the alleged incompetent was 25 years of age, had already given birth to a child and was, other than for retardation, an

otherwise healthy young woman. The attending physician could not form an opinion as to whether or not Ms. Terwilliger understood her own sexuality and suggested birth control pills as an adequate contraceptive measure. Testimony also indicated that Ms. Terwilliger lived with her family, had an IQ of 33, and had continued to be sexually active. The court determined that under the circumstances, a clear and convincing case had not been presented which would warrant sterilization as a means of birth control.

In Terwilliger, at 450 A.2d 1383 et seq., the court set forth the following guidelines:

> (2) The possibility that the incompetent person will experience trauma or psychological damage if she becomes pregnant or gives birth, and, conversely, the possibility of trauma or psychological damage from the sterilization operation.

(3) The likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her.

(4) The inability of the incompetent person to understand reproduction or contraception and the likely permanence of that inability.

. . .

(7) The ability of the incompetent person to care for a child, or the possibility that the incompetent may at some future date be able to marry and, with a spouse, care for a child.

(8) Evidence that scientific or medical advances may occur within the foreseeable future which will make possible either improvement of the individual's condition or alternative and less drastic sterilization procedures.

(9) A demonstration that the proponents of sterilization are seeking it in good faith and that their primary concern is for the best interests of the incompetent person rather than their own or the public's convenience. (Footnote omitted) Id. at 264, 426 A.2d at 483.

In the case at bar, the trial court utilized all of the above guidelines in

reaching a decision. For Cynthia, the trauma of sterilization, if any, would be no greater than the trauma of an abortion or of giving birth. The trial court was presented with facts from which one could conclude that Cynthia had engaged in some form of sexual activity. It is clear from the evidence that Cynthia lacks the ability to understand reproduction or contraception and it is unlikely that her medical and/or psychological condition will change in the foreseeable future. It is also clear that Cynthia is incapable of caring for a child, unable to marry, and, with a spouse care for a child. There was no evidence to indicate that there is any medical possibility on the horizon which would afford Cynthia safe contraceptive results, less drastic than sterilization, given her unstable grand mal seizure

condition. It is particularly noteworthy that the last guideline enumerated in Terwilliger was omitted from the guardian ad litem's brief. This case is not an attempt by a parent to impose sterilization as a means of contraception on a mentally retarded but otherwise medically healthy child. There is no question that the trial court correctly concluded from competent evidence that Cynthia's mother has only Cynthia's best interest at heart.

The court's findings of fact are fully supported by the record and are appropriate in light of the physical problems of Cynthia Wojciechowski. These facts justify the conclusion reached by the hearing judge. This conclusion is in accord with the law as enunciated by our appellate court. This is not a matter of the use of a tubal ligation as a method of

contraception where other contraceptive methods will be effective but rather a matter of authorizing medical care in Cynthia's best interest considering her many physical infirmities.

Accordingly, the Order of the trial court is affirmed.

BY THE COURT:

Pawelec, A.J.
Administrative Judge

Orphans' Court Division
Court of Common Pleas of Philadelphia

ESTATE OF CYNTHIA WOJCIECHOWSKI,
AN ALLEGED INCOMPETENT

No. 3107 of 1987

BEFORE: PAWELEC, A.J., BRUNO, BONAVITACOLA, JJ., and KLEIN and GUTOWICZ, Senior Judges (Specially Presiding)

DISSENTING OPINION

BRUNO, J.

I do not disagree with the hearing judge's finding that this woman is incompetent. I do not disagree with the hearing judge's finding that pregnancy would be "an unmitigated disaster" for this woman. I do not disagree that Cynthia's mother has what she perceives to be Cynthia's best interest at heart. I do, however, vehemently disagree with the conclusion of the hearing judge and of my colleagues on the court en banc that a

laparoscopic tubal ligation is in the best interest of this incompetent.

The entire focus of the proceedings before the hearing judge seemed to be the effects of a pregnancy on this woman. As I said above, I do not disagree with her finding that a pregnancy would be disastrous for this unfortunate woman. However, there was absolutely no evidence produced by the petitioner that Cynthia is or ever was sexually active. There was some evidence that she was sexually curious. Given her emotional and intellectual age of three to five years, a certain amount of sexual curiosity is to be expected. However, sexual curiosity is not sexual activity. The hearing judge placed great emphasis on the fact that at one time a male patient was seen leaving Cynthia's room and after that episode

Cynthia pointed to her pubic area. It is ridiculous to say that is evidence of sexual activity. Cynthia also pointed to her pubic area when she was being interviewed by a psychiatrist. Obviously, the psychiatrist did not attempt to have sex with her.

Rather than focusing on the detrimental effects of pregnancy, the hearing judge should have focused on protecting Cynthia from rape and sexual intercourse. The protection of this woman's physical person is the real issue in this case. Sterilization will not and cannot protect Cynthia from untoward sexual advances and abuse. It can only present on the unwanted results of sexual abuse and activity, pregnancy. What about the trauma of rape? What about the death sentence of AIDS and the horrors of

syphilis? By placing the sole emphasis on preventing pregnancy by protecting this woman's physical person, the hearing judge completely disregarded the principles outlined in Matter of Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1983).

In Matter of Terwilliger, 450 A.2d 1376, 1383, the Superior Court plainly and clearly stated that it must be established by clear and convincing evidence that: ". . . sterilization is the only practicable means of contraception, i.e., all less drastic contraceptive methods, including supervision, education and training are unworkable and detailed medical testimony must show that the sterilization requested is the least significant intrusion necessary to protect the interest of the individual." (emphasis in original). By authorizing Cynthia's guardian to

consent to sterilization, the hearing judge totally ignored the competent evidence produced by the guardian ad litem that there are a number of less restrictive methods of pregnancy prevention. I read Terwilliger as requiring that those less restrictive methods of prevention must be tried and found wanting before a court can authorize the sterilization of a retarded person. There was no evidence produced by petitioner in this case to show that other, less drastic contraceptive measures have proven unworkable.

This woman's constitutional rights to privacy and to bodily integrity are being totally trampled upon because the hearing judge and my colleagues are focusing on the easiest method of pregnancy prevention rather than the protection of the physical person of this woman. I find it very

discomforting that the hearing judge finds great comfort in the opinions of the various British judges of the House of Lords who permitted the sterilization of an epileptic teenage woman. I would hesitate to quote an opinion of the House of Lords in an issue concerning an intensely personal constitutional right. British jurisprudence is not American jurisprudence. British judges routinely condone governmental action, e.g., detention of individuals without informing them of the charges against them, which would be unthinkable in this country.

The hearing judge repeatedly states that she does not want to adopt "A do nothing" attitude. I do not suggest that this Court adopt such an attitude. However, it is absolutely not necessary to take the most extreme measure possible

when it has not been shown that other, more reasonable measures are unworkable. The best medical experts and the best auto mechanics believe that: "When it ain't broke, don't fix it."

If, based on the facts in this case, this woman is sterilized by a decision not her own, I pray that we do not find ourselves starting down that path followed by others not too many years ago. A path that led not only to the sterilization of the "unfit," but also to death.

Because the hearing judge's finding absolutely contradicts the principles enunciated in Terwilliger, I would sustain the exceptions of the guardian and vacate that portion of the Order authorizing the guardian to consent to the sterilization.

ORPHANS' COURT DIVISION
COURT OF COMMON PLEAS OF PHILADELPHIA

No. 3107 of 1987

ESTATE OF CYNTHIA WOJCIECHOWSKI
Alleged Incompetent

O R D E R

AND NOW, this 28th day of FEBRUARY, 1990, upon consideration of the petition to adjudicate Cynthia Wojciechowski an incompetent and to appoint Dolores Wasiak guardian of her person, and following extensive hearings thereon, and upon consideration of the briefs submitted, it is hereby Ordered and Decreed that

Cynthia Wojciechowski is adjudicated an incompetent.

Dolores Wasiak is appointed guardian of the person of Cynthia Wojciechowski.

Said guardian of the person is hereby authorized to consent to a laparoscopic tubal ligation for Cynthia Wojciechowski.

_____

J.

ORPHANS' COURT DIVISION
COURT OF COMMON PLEAS OF PHILADELPHIA

No. 3107 of 1987

ESTATE OF CYNTHIA WOJCIECHOWSKI
Alleged Incompetent

OPINION

JAMISON, J.

Dolores Wasiak has petitioned the court to have her daughter, Cynthia Wojciechowski (hereinafter Cynthia or Cindy), adjudicated an incompetent, and to have herself appointed as guardian of the person of Cynthia to authorize such medical or surgical procedures as are necessary to prevent pregnancy. The petition alleges that Cynthia suffers from severe mental retardation, and that "a tubal ligation is the only practical means of contraception."

The Court appointed Lorrie McKinley, Esquire, guardian ad litem "to represent the best interests of the alleged incompetent" in connection with the pending petition. Ms. McKinley, an instructor in clinical law at the University of Pennsylvania Law School, is associated with the Penn Legal Assistance Office.

Prior to the hearing, the Court consulted with counsel, reviewed with them the guidelines set forth in Matter of Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1982), and suggested that they retain experts of the highest caliber.

The guardian ad litem took an early stance that tubal ligation or any form of contraception is not in Cynthia's best interest and, at present, education and supervision are the preferred methods of preventing sexual activity, rape, or

conception. The guardian's cross-examination of petitioner's witnesses and direct examination of her witnesses reflect this adversarial posture.

Because of the formidable responsibility of applying principles of law, ethics and medical practice to the facts of this case, the testimony will be reviewed in detail.

I. Review of Evidence

Cynthia Wojciechowski is a 20 year old mentally retarded woman, who suffers from scoliosis, cerebral palsy and grand mal epilepsy. She is mute, has a very limited ability to sign, and has an emotional and intellectual age of three to five years. It is undisputed that her mental and physical disabilities are irreversible.

Cynthia was present on the first day of the hearings. She waved to the court with her "Kermit the Frog" puppet each time her name was mentioned. Otherwise, she seemed to be oblivious to the proceedings. Counsel agreed that Cynthia had no concept of the nature of the hearings and understood nothing other than her name. Cynthia remained in the courtroom and was quite restless throughout the testimony of the first witness, Ernest F. Keller, who reported on the high incidence of crime, particularly rape, in the City of Philadelphia. It was agreed it would be preferable that Cynthia not be present when her mother and the other witnesses testified. Additionally,it was obvious that it would be less distracting and emotionally painful for her mother to testify out of Cynthia's presence. Accordingly, Cynthia

was not present at any hearing other than her meeting with the Court in chambers.

At a later stage of the proceeding, the Court met with Cynthia, in the presence of counsel and her mother, who served as an informal interpreter for Cynthia's signing and gestures. Communication with Cynthia was difficult at best. Cynthia, who appeared anxious to please, signed "Yes" in response to virtually every question.

Cynthia was easily distracted, and showed little change in mood throughout the session. She concentrated primarily on a Walkman tape. She signed that she had brought her nephew, Ricky, into this world, that girls differ from boys in that women carry purses. In response to questioning, she signed, without differentiation, that she would like to have a baby,

that she would also like to have a puppy, that babies can be bought in a store and that here brother and sister-in-law had bought her nephew, Ricky. When asked to write her name, she wrote her first name. She willingly hugged everyone in the room, including a male court clerk who was called in to test her response to an unknown male. When asked how "babies get in tummies," she pointed to a necklace on a doll. She paid scant attention and drifted from any area on which the Court tried to focus her attention. She was able to write "dog" when shown a picture of the Judge's puppy and able to distinguish between statuettes of a dog and a rabbit. She was extremely suggestible, compliant and anxious to please. Her affect was that of an uncommunicative preschool child. It would have been futile

and well beyond her ken to have discussed reproduction and contraception with her. She demonstrated affection for and dependence on her mother who had considerable ability to respond to and communicate her expressions.

As the first witness, Dolores Wasiak, natural guardian and custodial parent of Cynthia, related that she was divorced from Cynthia's father, Frederick Wojciechowski, in 1978. She has since remarried. Mr. Wojciechowski consented to and joined in Mrs. Wasiak's petition, but did not participate in these proceedings. Petitioner and Mr. Wojciechowski have two other children, a son who is five years older than Cynthia, and a daughter three years older, neither of whom has any developmental problem.

Cynthia's legal residence is with her mother and step-father at 3060 Edgemont Street in the Kensington section of Philadelphia. She has resided in a community living arrangement (CLA) located at 4311 Sentner Street, operated by Ken Crest Centers, Inc., since she was 12 years old.

Mrs. Wasiak stated her reason for filing the petition was that Cindy is getting older and is a very affectionate child, with "a lot of medical problems," for whom pregnancy would be very harmful.

In recounting Cynthia's medical history from infancy, the petitioner was tearful, visibly upset and strained. She recalled that her delivery was difficult, and that Cynthia was born with an eye infection which necessitated placement in a newborn isolation unit. Mrs. Wasiak noticed that the infant had excessive

blinking of the yes. When Cynthia was three months old, she suffered her first seizure which lasted for about an hour. Throughout her first year, she had frequent seizures for which she was treated at Episcopal and St. Christopher's Hospitals. At 15 months, she underwent successful eye surgery under general anesthesia for correction of a strabismus. Thereafter, she had follow-up care at St. Christopher's Hospital, where, at age two and a half, she was enrolled in a program for developmental therapy. At age four, she went to the Ken Crest Early Intervention Program, and at age five, she attended a public school program for the severely and profoundly impaired. Cynthia has never spoken, although as a baby she babbled, and at about age four and a half, she made vowel sounds. As a young child,

she was very stubborn and had frequent temper tantrums. She often refused to eat or to sit down at the dinner table and "disrupted the whole family." Mrs. Wasiak consulted several physicians and a psychologist regarding Cynthia's behavior problems. Counselors recommended that Cynthia be placed in a group home and, at age 12, she was placed in the CLA at which she presently resides. The home is shared by one other female and three male residents who range in age from 17 to 22.

Cynthia attends a life skills program a Northeast High School and on alternate weeks she attends Swensen Skills Center. Transportation is provided by school bus. It was anticipated that upon graduation, she will go to a sheltered workshop. Every other week, Mrs. Wasiak takes Cynthia to her home from Friday evening to

Sunday evening. On those week-ends, Cynthia often visits at her brother's home. She looks at books, plays with toys, particularly Sesame Street's "Big Bird" and plays with her five year old nephew, Ricky. Cynthia also spends holidays with her family.

Cynthia has learned to dress and feed herself, but she is far from self-sufficient. She will continue to live in a group home so long as the funding is available. She takes her anti-seizure medication under supervision. She responds to music, likes to dance and attends dances at the CLA. She enjoys watching television, particularly the Sesame Street programs. She has a signing vocabulary of about 50 signs.

Several recent incidents have increased Mrs. Wasiak's concern for her

daughter's safety. On one occasion, during an outing with her Ken Crest group at Penn's Landing, Cynthia had been left alone in a public bathroom. On another occasion, during a visit to the CLA, Mrs. Wasiak observed a young male resident standing outside Cynthia's bedroom door while Cynthia was in her room changing.

Overall, Mrs. Wasiak is pleased with the care Cynthia receives at Ken Crest and finds it to be the best placement presently available. However, she has genuine concerns about continued adequate government funding for the CLA, frequent staff changes, and inconsistencies in their level of training and ability. With the recent cutbacks in government support for the retarded, Mrs. Wasiak is apprehensive that the CLA may be phased out.

Cynthia has had hospitalizations and surgery under general anesthesia for dental work, ear wax removal, extraction of wisdom teeth and a gingivectomy. None had have untoward results.

Mrs. Wasiak observed that Cynthia, who has had a great deal of pain throughout her young life, is spunky and is able to let others know when she is in pain. She is an extremely affectionate girl who hugs and kisses strangers, as well as people whom she knows. She seems to crave physical contact with others and will touch people even if they do not approach her.

According to her mother, Cynthia has regular menstrual periods. She is able to change her own sanitary pads, but doesn't know when to stop wearing them. She once wore a pad for a full month.

Mrs. Wasiak does not believe that Cynthia has been sexually active. Mrs. Wasiak has spoken to medical professionals about various methods of contraception for Cindy.

Mrs. Wasiak stated that Cynthia did not understand menstruation, reproduction, intercourse, conception, or fertility, and was not cognizant that certain parts of her body should not be touched by others.

Mrs. Wasiak testified that because of her seizure disorder, Cynthia should not be left alone for periods of more than one-quarter to one-half hour at Ken Crest. She reported one incident, however, in which Cynthia had a seizure and fell from her bed while unattended.

Mrs. Wasiak, who herself has had a laparoscopic tubal ligation, is of the opinion that sterilization by minilapa-

roscopy is the best and safest contraception for Cynthia. Although Mrs. Wasiak agreed that Cynthia could participate in sexuality training, she was doubtful that Cynthia could understand the program. She is concerned that Cynthia continues to embrace strangers after being told that such behavior is inappropriate.

Marna Sternbach, M.D., Cynthia's treating physician since September 1986, testified that she see Cynthia at Germantown Hospital for regular checkups for her seizure disorder and cerebral palsy. In November 1987, Cynthia was hospitalized for seizure disorder related tegrital toxicity, difficulty in walking, nausea, vomiting, and possible pneumonia. Cynthia also sees a neurologist on consultation. Her medication in 1988 was Phenobarbital 90 milligrams two times a day, 300

milligrams of Dilantin at night and 800 milligrams of Tegrital four times a day. Although the medication generally controls the seizures, viral illnesses or any infection may promote a seizure. Without medication, she could have a fatal status epilepticus.

Dr. Sternbach reported that Cindy is unable to give a medical history or discuss pregnancy. When questioned as to possible methods of birth control, she was of the opinion that barrier methods would not be appropriate; that because of pain and possible pelvic infection, an intra-uterine device (IUD) would be too risky for Cindy; and that oral contraceptives are not recommended because of possible side effects. Dr. Sternbach added that a pregnancy would be harmful for Cynthia's mental and physical health. She

recommended a tubal ligation as the simplest most definitive procedure for the prevention of pregnancy with the fewest risks for Cindy. Dr. Sternbach explained that the medications Cindy takes are all teratogenic and each could cause congenital abnormalities in a fetus.

Dr. Sternbach reported that in her practice she had one case of a mentally retarded young woman living in a supervised CLA who became pregnant. The pregnancy was not discovered until about the twentieth week and the patient underwent a mid-trimester abortion.

Dr. Sternbach characterized a tubal ligation through a laparoscope as a "pretty simple procedure" which takes 15 minutes and is generally done on an outpatient basis. In Cindy's case, an

overnight stay and general anesthesia would probably be required.

Melvin S. Heller, M.D., a board certified psychiatrist, testified as an expert witness for the petitioner. Dr. Heller's credentials include a degree from Tufts Medical School in 1948, a residency in child psychiatry at Yale University from 1950 to 1954, and a fellowship in child psychiatry at the Child Study Center of the Institute of Pennsylvania Hospital. He has been in private practice in adult and child psychiatry since 1957, and has, for over 30 years, been Clinical Professor of Psychiatry and Director of the Institute of Law & Health Sciences at Temple University. He has, inter alia, served a Chief Psychiatric Consultant to the Court of Common Pleas of Philadelphia and as Director of the Division of Forensic

Psychiatry, Office of Mental Health of the Commonwealth. Dr. Heller's credentials reflect a longstanding interest in patients' rights and mental health law.

Dr. Heller examined Cindy at the offices of Dr. Jerome Knast, a psychologist who is fluent in sign language. He also visited her and the staff at the Ken Crest CLA. Each evaluation lasted over an hour and a half. Dr. Heller also reviewed Cynthia's medical, psychological and school records.

After reviewing Cynthia's childhood developmental history, Dr. Heller testified that her pre-school records revealed that she was moderately severely retarded with an I.Q. of about 30 to 32. School reports indicate that Cynthia is "not educable but trainable," that she is quite socially isolated and that her cognitive

language skills are fixed at age three and a half.

Based upon the medical records, Dr. Heller testified that Cynthia's tonic clonic seizures, accompanied by stiffening and shaking, occur about once or twice a month and are an element of her cerebral palsy. Cynthia has some atrophy of the brain and her mutism is caused by organic brain damage. She has a partial paralysis of the left side (stable left hemiparesis) with residual awkwardness of the left arm and an awkward gait. Dr. Heller concluded from the gynecological report of Dr. Nancy C. Czarnecki, that Cynthia's hymen is not intact and she does not have a virginal tract.

Dr. Heller comment on the various pejorative connotations of the word "sterilization." "It is a legal term ...

a very generic term and includes a number of conditions, some of which are reminiscent of gas chambers, like the removal of the ovaries, or the surgical removal of the male testicles." He noted that tubal ligation, on the other hand, and various other contraceptive methods, although called sterilization, are not sterilization in that sense.

Dr. Heller sharply disagreed with the opinion in the written report of Elissa Lewin, an expert witness for the guardian ad litem, that since Cynthia is never alone, "a less restrictive and more positive approach to avoiding rape and pregnancy would be programming (sic) for appropriate social skills."

Dr. Heller was of the opinion that Cynthia has no ability to grant or refuse informed consent or exercise reasonable

judgment. He characterized her as a "young woman who is substantially retarded and who is emotionally fixated about the age of four or five...she is not even at the pre-school emotional level. She is a very childish, endearing, snugly kind of a person, a touching little girl...."

Dr. Heller was pessimistic about Cindy's chances of improvement. He concluded that she is going to be a child and remain a child vulnerable to molestation for the rest of her life. He is convinced that "birth control is necessary in this highly vulnerable person and it cannot be dismissed on the erroneous and unchecked conclusion that she is under constant watch because of her epilepsy...."

Dr. Heller reasoned further that increased security and more stringent monitoring would be detrimental to Cindy:

"Ken Crest is responding as well as they can but this custodial approach to contraception at best is going to make this child/woman an asexual sheltered individual with no chance to relate. She is going to continue in this highly dependent, abnormal situation, which is not in her best interest. She is going to become increasingly a depressed vegetable. Her only hope is perhaps to be able to relate to other human beings, peers, appropriately, even within the parameters of how two or three or four year old children relate to each other, and this is very, very important."

Dr. Heller related that he has had substantial experience and "spent a professional lifetime prescribing supervision for people." Yet, on occasions where he has written orders in state hospitals for one on one supervision as suicide precautions, or in the correctional system, where there is maximum supervision, he has nevertheless found people hanging and women in the county prison system who get pregnant.

In Dr. Heller's judgment, even the most heroic and skilled efforts to provide Cynthia with "programming for appropriate social skills" as recommended by Ms. Lewin, is futile. "You can't teach a person appropriate social skills if they can't communicate with you."

It was Dr. Heller's opinion that pregnancy and childbirth would be traumatic for Cynthia. He hypothesized:

> "What would happen if Cynthia became pregnant and despite her seizures and hemiparesis had a normal delivery and a healthy infant? She could not be a competent mother and would have no ability to care for the child. Is the child adoptable? Can Cynthia sign permission for the adoption? Cynthia is going to be traumatized. She could not be separated from her Kermit the Puppet without kissing it. She is not going to be separated from a baby without being terribly, terribly traumatized."

Dr. Heller wholeheartedly endorsed tubal ligation for Cynthia. In his considered opinion, contraception by tubal

ligation is:

> "... the least intrusive, least physiologically harmful approach, which is reversible in the large majority of cases... and which would in no way alter her physiology, her periods, her ovarian functions, her secondary sexual characteristics, her feelings of femininity, or interfere with her ability to relate to others."

Dr. Heller was skeptical of the guardian's theories of "least restrictive alternative," "socialization" and "normalization" as applied to Cynthia. In his judgment, these concepts and policies are fine in theory; they are not effective in practice. Dr. Heller is convinced that Cynthia's learning ability is so impaired by irreversible neurological damage that her prognosis for learning substantially more than she knows now is not favorable.

Petitioner called Jerome F. Knast, Ph.D., a psychologist who had evaluated Cynthia through formal testing and

behavior observations and reviewed her medical and psychological records. Dr. Knast stated her IQ to be 52 and determined her adaptive behavior composite at the equivalent of ages five to eight. He reported that her poor picture arrangement sub-test indicates that she has great difficulty in understanding social clauses and consequences of behavior. She is not able to anticipate and plan appropriate actions in social situations. On the PPVT-R test, Cindy's oral receptive vocabulary was found to be only at the level of a three year old.

Dr. Knast related that Cynthia twice displayed instances of inappropriate behavior with him. During a test in which Cynthia was attempting to communicate a story, she lifted her blouse, pulled down the waistband of her pants to show him her

navel and laughed inappropriately. Earlier, she had reached over to tickle him on the stomach a couple of times and to touch his nose.

Dr. Knast believed that Cynthia is unable to give informed consent and that pregnancy would create a potential health risk for her. He concluded that sterilization would be in Cynthia's best interest and "should be necessary for her habilitation program for her to function in a more autonomous manner." He further recommended that Cynthia be given additional communication skills training and socialization activity in a total communications environment with other developmentally disabled teenagers and young adults and should participate in social activities of other CLA's.

Dr. Knast determined that Cynthia's mental retardation, which will not improve, interferes with her ability to learn sign language. He found that:

> "Cynthia is very interested in activity that is of a sexual nature like the tickling and the touching of myself...likes to sit in people's laps, male and female, and be cuddled and rubbed...she sometimes will slap men on their buttocks. She is very sensual and she wants physical contact. She seems to really make physical contact with other people even if they don't approach her first, and I think she is not aware of being seductive or flirtatious or of a foreplay kind of nature."

He was of the opinion that it would take at least two to three years to develop the communication skills that are the first requisite for behavior modification training.

Dr. Knast stated that sterilization will improve Cynthia's level of rehabilitation and will lead to greater autonomy for her. She could "develop more

normalized kind of dating and pre-dating kind of behavior as far as being able to dance, to hold hands, to kiss, to touch; but it might allow some more of those kinds of activities to take place for her without the concern that it might lead to pregnancy." He doubted that a combination of education and supervision as proposed by the guardian ad litem can be effective in preventing pregnancy for Cynthia.

H. Michael Seitz, Jr., M.D., a board certified gynecologist and obstetrician, an associate professor of obstetrics and gynecology at the University of Pennsylvania School of Medicine since 1970 and a staff physician of the Hospital of the University of Pennsylvania, also testified as an expert for the petitioner.

Upon review of Cynthia's medical records, Dr. Seitz was of the opinion that

she was ovulating and could become pregnant; that a pregnancy would be detrimental to her grand mal epilepsy which requires toxic levels of anticonvulstants to maintain her in a seizure free condition; that statistics indicate she might be more seizure prone during pregnancy and that pregnancy for her would be extremely traumatizing emotionally. In the event she became pregnant, a therapeutic abortion would be extremely traumatic. Abortion also carries the risks of perforation, hemorrhage and infection. Should a child be born, there is at least a four-fold greater chance that the child would inherit the epileptic condition and a twelve percent greater change of major congenital defects. If Cynthia were to be on the high dosage of seizure medication she presently requires during a pregnancy,

she could spontaneously abort or have a premature birth, both of which are traumatizing to the patient. Dr. Seitz believes that if Cynthia's seizure medication were withdrawn, "she would have frequent seizures which would be exceedingly dangerous to the fetus, as will as the maternal organism."

Dr. Seitz recommended a modified bilateral laparoscopic tubal ligation with high frequency current as the most effective, least restrictive method of prevention of pregnancy. He described it as a safe, simple, out-patient procedure, following which the patient usually returns home in a couple of hours and is back to work within 72 hours. He noted "one of the important things about it is, although it is considered to be a permanent sterilization, it really is not."

The rate of reversibility is upwards of 80%. The risk of failure is one in 300. Other risks are rare. The mortality rate is three per 100,000 and generally related to the anesthetic.

Dr. Seitz ruled out all other means of contraception, including barrier methods such as male condoms, diaphragm, or foam, because Cynthia lacks compliance or comprehension capabilities and because of the failure rate of 15 to 25%. Likewise, oral contraceptives are inappropriate, because of the risks of thromboembolic disease, hypertension, possible carcinogenicity and relatively short-term, rather than lifelong coverage.

With respect to other possible contraceptives, Dr. Seitz reported that the sole intrauterine device currently available is progestasert. It is

unsuitable for Cynthia because it has to be replaced each year and has the risks of infection, perforation and abnormal bleeding.

Dr. Seitz explained that laparoscopic electrocoagulation involves the insertion of a telescope into the belly button with a distal light source, identifying and burning a segment of the Fallopian tubes so that they are closed. Should the patient decide to reopen the tubes, they surgeon can often cut out the obstruction and successfully bring the two open ends together again.

Dr. Seitz concurred with the opinion of Dr. Sternbach that if Cynthia were to have a laparoscopy, it would be better for her, because of her seizure condition, to enter the hospital the day before the procedure and remain as an in-patient the

day after. Cynthia would probably be given sodium pentathol with a little gas anesthetic. After adequate pre-operative preparation and medication, she would not be at higher than average risk. Following laparoscopic coagulation, she would be out of bed in two hours and could resume light activities within 72 hours. Tylenol or a little codeine would be given for pain relief.

Dr. Seitz advocated this procedure as the ideal and least intrusive method of birth control for Cynthia. Although "it is more invasive than popping a pill, it is, under the circumstances, the most desirable."

Dr. Della Grossman, who holds a doctorate in education in counselling psychology from the University of Pennsylvania, was called as an expert by the

guardian ad litem. Dr Grossman found that Cynthia has a severe neurological deficit and she determined Cynthia's full scale IQ to be 48. Other test results indicate that Cynthia functions on an intellectual and social level of a pre-pubescent child. In her written report, Dr. Grossman concludes: "Cindy is currently living in an environment so closely supervised that the possibility of either voluntarily engaging in sexual activity or being exposed to forced sexual activity is extremely improbable."

Dr. Grossman stated that "since Cynthia is not sexually active, has no interest in becoming so, and is so closely supervised, she is not at risk of becoming pregnant and does not need birth control."

In Dr. Grossman's judgment the recommendation of Drs. Heller and Knast that

Cynthia be sterilized were not consistent with the "least restrictive alternative" doctrine, because they did not allow for any less restrictive alternatives, such as other forms of contraception and abortion. She might recommend sterilization for someone with a higher level of retardation than Cindy who lives freely in the community. Dr. Grossman disagreed with Dr. Knast's opinion that sterilization could increase Cynthia's level of habilitation because she would continue to have the same level of supervision necessitated by her seizure disorder.

Dr. Grossman also stated that sterilization was inconsistent with the least restrictive alternative in terms of dealing with the fear of attack on Cynthia, because sterilization cannot prevent rape, nor can it prevent the

trauma and emotional consequences of such an attack.

Dr. Grossman thought that if someone made sexual advances to Cindy, she would communicate what happened.

The guardian next called Elissa Lewin, a licensed psychologist whose specialty is "the sexuality of the mentally retarded." Ms. Lewin recalled that she had administered a basic sex education program to Cynthia when she was 12 and 13 years old and that Cynthia had been able to progress through the program. Although that training program provided identification of basic body parts and Cynthia then could differentiate between male and female, she cannot presently make that differentiation and has little knowledge of body parts.

Ms. Lewin, who performed two assessments of present sexual knowledge on Cynthia, concluded that she is not sexually active, has no awareness of sex, and her affectionate gestures are not indications of sexual interest. In her "Sexuality Evaluation Regarding Sterilization Report," Ms. Lewin noted that when she asked permission of Cynthia to touch her crotch, Cynthia signed "OK" and emphatically "Yes." Ms. Lewin expressed her concern about Cynthia's vulnerability to being victimized and noted that the staff believes that if Cynthia was left alone, she would go with anyone who was nice to her, that there is a chance of sexual abuse by a staff person, but that her risk of sexual abuse or involvement is "nominal."

Ms. Lewin determined that Cynthia's sexual activity is limited to masturbation, that she understands the concept of masturbation and was able to demonstrate it. During a discussion of intercourse, Cynthia gestured to Ms. Lewin that she engages in intercourse "all the time" and with every male she knows (her father, staff and CLA residents). She found that Cynthia has an early adolescent awakening of feelings and fantasies, is keenly aware of her sexuality and femininity and uses both whenever possible, even where inappropriate. She engages in inappropriate touching, especially with strangers.

Ms. Lewin was of the opinion that the least restrictive alternative for Cynthia would be a training program which would make her less vulnerable. She thought

that Dr. Heller, in applying the principle of least restrictive alternative, did not fully consider the circumstances of Cynthia's life, nor the options available to her. In her opinion, sterilization could never be considered the least restrictive alternative without considering other available alternatives, such as supervision and education.

Donna Fey, who holds a bachelor's degree in Psychology and Communications from the University of Hawaii, was called by the guardian ad litem as an expert in sexuality and disability. Ms. Fey had not met Cynthia, but based her opinion upon an interview with Cynthia's mother and her review of Ms. Lewin's sexuality report.

Ms. Fey stated that since Cynthia is not sexually active and has no inclination to be so, and because she is in no real

danger of sexual abuse, she should not be sterilized. She added that sterilization may, in fact, place Cynthia in greater danger of sexual abuse, because sterilized people are safer targets than those who may become pregnant. She suggested that if Cynthia became pregnant, she should take the morning after pill. She stated that there would be less risk for Cynthia to have an abortion than to take birth control pills and that sterilization only addresses the pregnancy risks, not the abuse risks.

To prevent sexual abuse, Ms. Fey recommended educational programs for Cynthia. She believed that Cynthia was a good candidate for these programs, including "circles" and "good touch, bad touch" which are specifically designed for persons with her level of functioning.

Ms. Fey testified that other means of birth control were a possibility for Cynthia and that Cynthia would be able to communicate her discomfort if she experienced any side effects from the pill. She thought that Norplants, which are hormonal inserts placed under the skin and last for up to five years, could possibly be used for Cynthia. (Norplants are not legal in the United States.) In her opinion, an abortion within 12 weeks is a safer procedure than sterilization.

James McFalls, the Director of Residential Services at Ken Crest, who is a behavior specialist, also recommended the behavior modification theory of birth control for Cynthia. He is not involved in day to day management of Cynthia's CLA, but serves in a supervisory capacity. Mr. McFall is confident that Ken Crest homes

"provide adequate supervision and training and have an adequate on-call system." Ken Crest has policies for dealing with sexuality, staffing, application of the least restrictive alternative, client abuse, as well as policies for supervision and training. With respect to the policy on sexuality, he believes the principles of least restrictive alternative and normalization dictate that the need should match the intervention: that if there is minimal need, there should be minimal intervention. Accordingly, contraception should be ordered only if there was a compelling need for contraception; sterilization only if there was a compelling need for sterilization.

Mr. McFalls predicted that if Cynthia were to have a tubal ligation, it would have no effect on her placement and

treatment, would not cause her any psychological harm and in no was affect her adjustment to her present placement.

At this point in the proceedings, the petitioner and guardian litem had submitted all of the testimony which they originally intended to offer and prepared briefs in support of their positions. An amicus curiae brief was also submitted by Pennsylvania Protection and Advocacy, Inc., which espoused the position of the guardian ad litem.

Following the Court's review of the brief and upon consideration of the high degree of scrutiny mandated by Terwilliger, the Court deemed it appropriate to appoint Dr. Ronald J. Bolognese as an impartial medical expert in the field of obstetrics and gynecology.

In addition, petitioner requested the Court to reopen the record to admit testimony concerning Cynthia's behavioral changes and an incident which occurred at the CLA following the end of the first set of hearings.

Accordingly, the Court scheduled additional hearings to receive petitioner's evidence and the testimony of the Court appointed expert.

At the supplemental hearing, Mrs. Wasiak testified that early in 1989 Cynthia exhibited serious behavior problems; she was self-abusive, biting and scratching herself, uncooperative and aggressive toward others. After consultations with a neurologist and a neuropsychologist, certain behavior modification programs were instituted, and her dosage of Dilantin was decreased from 300

milligrams to 250 milligrams daily. However, in May, she suffered a seizure, was hospitalized, and the Dilantin then was increased to 300 milligrams daily. On June 21st, she again had a violent seizure, fell on the street, cut the area over her right eye, and was scraped and bruised. The dosage of Dilantin was then increased to 400 milligrams daily. In June, 1989, she graduated from a retarded trainable class and it was anticipated that she would enter a sheltered workshop program in October or November, 1989.

Mrs. Wasiak reiterated her motives if filing the petition. She testified that:

> "[I] just wanted to see her have a life. I am not trying to stop her from any kind of life. I want to do the best I can to protect her from any new problems happening in her life."

Under cross-examination, Mrs. Wasiak noted that Cynthia's problem behavior had

decreased somewhat from two or three times a week to about once every two weeks. To the best of her knowledge, there had been no one on one education for Cynthia. She related that there had been substantial turnover in the Ken Crest staff during the last year.

Mrs. Wasiak further testified that she was advised of an incident on March 13, 1989, at about 9:30 P.M., when Francis, a male resident of the CLA, was found leaving Cynthia's bedroom. Cynthia indicated to Wilhelmina Brooks, the staff worker, that Francis had touched her on her breasts, her arm or waist, and her pubic area three times. At her next home visit two weeks later, Cynthia, related this incident to her mother without visible agitation.

Wilhelmina Brooks, the resident advisor and the staff supervisor at Cynthia's CLA, was called as a witness by the guardian ad litem. She testified that on the night of the incident, she came up from the basement, heard a noise on the monitor from Cynthia's room, and noticed the light was out in the upstairs hallway. As she switched the hallway light on, she saw Francis running from Cynthia's room. According to Ms. Brooks, Cynthia was visible upset and signed that Francis had touched her and pointed to her breasts, waist and public area. Her nightgown had been pulled up.

Monica Scott, presently the program manager at Cynthia's CLA, is a psychology student at Temple University who has received most of her training over the past year at Ken Crest. She sees Cynthia

daily, teaches her household chores and independent living skills. She observed that Cynthia is very friendly, lovable and affectionate. At times, she is stubborn and non-compliant. She notices that Cynthia is presently acting somewhat more appropriately for her age. During the period when Cynthia was excessively self-abusive, she rewarded her when some improvement was shown by approving home visits with her mother. Attempts have been made to redirect somewhat her affectionate manners with strangers. She reported that Cynthia's mother is not as strict with her as the CLA staff in discouraging immature behavior.

Cynthia is currently involved in a sign language program, a sexual behavior program, and nutrition and exercise programs. Ms. Scott stated that plans are

being made to move Cynthia and her roommate to an all female residence. These plans are quite tentative, since a site has not yet been located.

The guardian ad litem objected strenuously by letter prior to the hearing and at the hearing to the testimony of Dr. Bolognese, the court appointed medical expert. Inasmuch as Terwilliger suggests that the Hearing Judge call impartial experts, and the Court has the right and duty to control the proceedings, the testimony was received subject to the objection, and the objection is now overruled.

Dr. Bolognese, a graduate of Princeton University and the University of Pennsylvania School of Medicine, is board certified in obstetrics and gynecology and sub-boarded in maternal/fetal medicine.

He is Chairman of the Department of Obstetrics and Gynecology at Pennsylvania Hospital. He has written approximately 100 articles and three textbooks in the field of diagnostic laparoscopy, sterilization, therapeutic abortion and the care of the high risk patient in obstetrics and gynecology. Before his examination of Cynthia, he reviewed the records which had been forwarded to him by the guardian ad litem, including the brief of the Amicus Curiae, the guardian's Memorandum in Support of Proposed Findings of Fact and Conclusions of Law, a letter from Germantown Neurological Associates, a sexual evaluation regarding sterilization from Paul Volosov Associates, the Germantown Hospital records of admission on November 23, 1987 for seizure disorders, the record of the Audiology Department at

Temple University, and the report of the clinical audiologist from that institution dated March 15, 1988. He did not review the testimony of Dr. Heller. Dr. Bolognese testified that:

> "Cynthia's general demeanor was very pleasant, very friendly, almost coquettish, during her visit. She was very cooperative throughout both my discussing briefly with her mother what I planned to do as far as the examination and during her personal examination. She seemed to anticipate the pelvic portion of the examination. And on several occasions, as I did a general physical, beginning with listening to her lungs and checking her thyroid function and examining her breasts, she kept pointing to her genital area as if implying to me that I should get to that portion of the examination."

He reported that Cynthia is a well developed female with normal pelvic findings. "I think the one feature that was of some surprise to her mother was that Cynthia does not seem to be virginal." Cynthia tried to sign with him several

times - "more demonstrative signs, rather than word signing." He said that she easily tolerated the speculum examination and showed no discomfort since he was not examining a virginal vagina. His conclusion was:

> "I think clearly she requires some form of contraception . . . one would be a method of contraception that would not worsen her general medical status, largely her epileptic seizure disorder, and still provide her with a degree of safety that would be as close to 100% as possible.
>
> The second question would be whether or not, on a long term basis, her condition is going to be such that she could carry a pregnancy without great risk to herself and the fetus and be capable of handling that child after birth. . . .
>
> I don't think that any thing has surfaced in her records to suggest that her general medical condition will improve to the point that five years or ten years from now that her medical condition and her general mental abilities will be significantly improved to change that prognosis."

Dr. Bolognese characterized Cynthia as "a substantial epileptic" based upon the medication that she is taking. If she were to become pregnant, there would be considerable risk for congenital malformations, as well as mental and learning disorders of the newborn.

Dr. Bolognese is concerned that Cynthia would be at increased risk for seizure disorders during the course of a pregnancy. Repetitive seizures would potentially increase injury to herself and would place the fetus again at risk. The high doses of medication would quite possible have to be raised. A physician would be reluctant to allow a labor for her because of the time and medication involved, and might choose a Caesarean section which is a major operative procedure. During pregnancy, epileptics have a

greater seizure incidence due to fluid accumulation in the brain or changes in vascular supply.

Speaking as an obstetrician whose area of specialty is high risk pregnancy, he believes that Cynthia should never conceive unless her medical condition drastically changes during her reproductive age bracket. Nothing in his gynecological examination suggested that she is anatomically incapable of becoming pregnant or bearing a child.

He was of the opinion that the ideal method of contraception for Cynthia is one that will provide her 100 percent protection. He ruled out hormonal therapy by daily use of birth control pills or injectable Delaluten at weekly intervals because of mixed reactions to her seizure disorder. He considered Depo-Provera

unsatisfactory because it may cause liver abnormalities and Cynthia is taking drugs that require normal liver functions. The doctor stated that, "The experience of going through a temporary method that requires additional medication to prevent her pregnancy does not seem justified." He suggested that the best approach would be a method that would provide her close to 100 percent protection and proposed a laparoscopic tubal sterilization. Dr. Bolognese described the operation, which is done under general anesthesia, and is generally an outpatient procedure, in some detail:

> "In a normal patient without the complications of Cynthia, the patient is discharged about two hours after surgery. The procedure is immediately protective and is essentially 100%.
>
> In Cynthia's circumstances, because of her epilepsy or seizure disorder, she would require hospitalization the night before to appropriately modify

her medications, and then hospitalization after the procedure to again monitor her medications and seizures following the surgery."

Dr. Bolognese has performed 800 to 1,000 laparoscopies. He prefers his technique to the mini-laparoscopy described by Dr. Seitz. Although the mini-laparoscopy may be reversible, Dr. Bolognese's method is not. In the remote event Cynthia would ever opt to have a child, she could do so by in vitro fertilization.

When asked about the suggestion by witnesses for the guardian ad litem that abortion would be an alternative if Cynthia were to become pregnant, Dr. Bolognese replied that Cynthia probably would not know the symptoms of pregnancy early and a diagnosis might not be made during the first or second trimester. The risk of maternal death, secondary to an abortion of one in 100,000 cases, and from

laparoscopic tubal sterilization is the same. Accordingly, if Cynthia were to become pregnant and the pregnancy was terminated by abortion, she would have experienced the same risk involved in a laparoscopy and the basic problem of prevention of pregnancy would not have been addressed.

After a laparoscopy, there is no change in the woman's menstrual cycle, her psychological affect or feelings of femininity. In Dr. Bolognese's judgment, the risks inherent in a pregnancy and those of a tubal ligation are "worlds apart." The laparoscopy is relatively simple, whereas a pregnancy, complicated by seizure disorder and the necessity of a major surgical procedure, such as a Caesarean section and a longer recuperation

period, are far more dangerous and invasive.

Dr. Bolognese is not aware of any medical or scientific research that, within the foreseeable future, would result in some alternative or long-term method of birth control which might be appropriate for Cynthia.

In cross-examination, Dr. Bolognese did not agree that education, training and supervision, as proposed by Drs. Lewin and Grossman, would be effective in preventing possible victimization or involuntary intercourse. He stated:

> "I guess the only comment I had in reviewing the records and the testimony that preceded me was the position proposed that the likelihood of this young lady becoming pregnant was extremely small because of the circumstances in which she lives and that because of the severity of her disorder, someone was checking on her every 10 to 15 minutes. Perhaps I am a pessimist, but I truly can't believe that over the course of the

> next 20 years of her reproductive cycle that that feasibility will be there all the time, and, secondly, much can be achieved in 10 to 15 minutes that can cause a pregnancy, so I would be somewhat pessimistic that that approach will work. Now, whether she is capable of being educated and trained to decipher advances, again, I think that is sort of out of my province, but I don't understand how one can be trained to prevent rape."

Dr. Bolognese stated that he would not be surprised if Cynthia would voluntarily engage in sexual intercourse. In his opinion, Cynthia has a normal level of male/female interaction or interplay and she could well be sexually active.

In response to many of the questions posed by the guardian ad litem with "assumptions of possibilities," Dr. Bolognese said, "Anything is possible."

Dr. Marna Sternbach, Cynthia's primary treating physician, was recalled. Dr. Sternbach testified that after

Cynthia's serious behavior problems had surfaced in early 1989, she consulted with Cynthia's neurologist, who at first was reluctant to reduce the dosage of Dilantin. He agreed to do so in March or April and started her on Xanax (a tranquilizer) as well. She reported the increases in dosages of Dilantin after Cynthia's seizure in late May, and after the severe seizure in June. Since June 1989, Cynthia has been on 400 milligrams of Dilantin daily and has remained seizure free. Dr. Sternbach characterized Cynthia's seizure disorder as "very tenuous and not very stable or easily controlled." Dr. Sternbach confirmed the conclusions set forth in reply to an inquiry from Ms. McKinley, the guardian ad litem, in a letter from Karen Hartnett and kevin Hepler, M.D. dated March 7, 1988, that:

"a tubal ligation performed under general anesthesia would pose the same risks as for the general population which are considered relatively minor . . . birth control pills can cause a multitude of side effects ranging from nausea, depression, headaches, weight gain, etc., up to and including deep venous thrombosis and stroke. I do not feel Cynthia has the mental capabilities to express herself adequately regarding the many side effects... Cynthia's mental status is insufficient to understand the meaning of pregnancy and (she) would be incapable of raising a child.... Furthermore, a pregnancy could potentially increase her seizure activity and the seizure medication she takes could potentially have some harmful effects on the fetus...general anesthesia would probably not complicate the seizure disorder."

Dr. Sternbach believes that for Cindy, "a pregnancy would be devastating." The increased dosage of Dilantin makes her worry even more about the effects of pregnancy on Cynthia's seizures and the possibility of fetal malformation. Yet, if the dosage of Dilantin were reduced, in the event of pregnancy, Cynthia would be

subject to more frequent seizures. No good choice would exist.

A notation appears in Dr. Sternbach's records of Cynthia's visit on September 19, 1989 - "Caretaker notes increased kissing involvement with boyfriend." Dr. Sternbach concluded that the most reasonable and best form of birth control for Cynthia would be a tubal ligation.

The guardian ad litem recalled James McFalls, who stated that plans were being made to located additional Ken Crest housing and to have the women at the Sentner Street CLA moved to an all female residence where there would be increased supervision and which would provide a "less intense situation and be more age and socially appropriate." The annual cost for each resident ranges from $50,000 to $80,000. In Mr. McFalls' judgment,

Cindy's use of signs was greatly improved (Mr. McFalls is not fluent in signing). He stated that Cynthia recognized him and greeted him with a handshake. Since her tantrum and self-abusive behaviors are under some degree of control, he stated that more emphasis will be placed on good social interaction. Her present behavior program is based on "gentle teaching philosophy, non-adversive techniques." Mr. McFalls continues to be of the opinion that sterilization is not the least restrictive alternative. He thinks that Cynthia's progress over the past year has provided her with the material to become a more independent person and to control her own destiny a little bit more as she moves from a school situation to a work situation.

Mr. McFalls was critical of Dr. Bolognese's testimony because he thought Dr. Bolognese did not take into account the administration of medications and other controls that the CLA provides, and that his recommendation of a tubal ligation was "based just on mental retardation."

On cross-examination, Mr. McFalls stated Cynthia's mental intellectual age ranged between months to age seven. He believes that she is more intelligent and her adaptive abilities are higher than her test scores. He agreed that the policy of checking on Cynthia every 15 minutes to half hour was as much for the purpose of preventing sexual activity as for monitoring her seizures.

The Court has examined Cynthia's medical records which are extraordinarily

extensive for such a young woman. They indicate, inter alia, "grand mal epilepsy, frequent seizures, heavily medicated." She is "retarded in the trainable category." She has been treated for vaginitis, pneumonia, and urinary tract infection. IN 1968, she suffered 8 seizures; in 1970, 35; in 1972, 52; in 1973, 40; in 1974, 61; in 1975, 38; in 1976, 9; in 1977, 36; in 1978, 52; in 1979, 40; in 1980, 40. In 1987, it is noted that she was receiving "toxic levels of Tegritol."

II. Discussion and Conclusion

The Court finds, upon consideration of the voluminous evidence, that Cynthia's interest and future welfare will best be served by appointing her mother guardian of her person and authorizing her to consent to contraception by tubal ligation.

This finding is based not on assumptions and possibilities, but rather on the existing realities of Cynthia's physical and mental condition and her present and anticipated lifestyle. It is further founded upon a balancing of the risks and burdens attendant upon guaranteeing absolute protection from pregnancy, against the risks and uncertainties of "doing nothing," or reliance on hypothetical, impractical and theoretical concepts.

The realities, as established by clear and convincing evidence, are:

(1) Cynthia is an affectionate, coquettish, vulnerable and endearing young woman. She is severely retarded and functions on an intellectual and emotional level of a three to five year old child. She has been characterized as "trainable" but not educable. Cynthia is unable to

speak and suffers from scoliosis, cerebral palsy and a severe seizure disorder. Her grand mal epilepsy has been controlled by high, potentially toxic, doses of Dilantin, Phenobarbital and Tegritol. She must rely on staff at her CLA or her mother to administer the drugs.

(2) Cynthia does not understand contraception, intercourse, or pregnancy and birth. She lacks the capacity to make a decision about, or give an informed consent to, any medical treatment, including contraception and tubal ligation.

(3) Cynthia's physical and mental conditions will not improve. Examinations by competent gynecologists indicate that she is presumptively capable of bearing a child, and she will probably be fertile for at least another 20 years. Her hymen is not intact, and it is possible that she

has engaged in sexual intercourse which has not resulted in pregnancy. She exhibits the normal sexual drives and awareness for her physical age.

(4) Pregnancy would be an unmitigated disaster for Cynthia. The prospects or regulating or withdrawing her seizure medication, as well as the trauma attendant on the alternatives of abortion, a Caesarian section under general anesthesia, or labor and natural childbirth, and the inevitable separation of the newborn from Cynthia, are disturbing to contemplate. The high probability of fetal abnormality and the life threatening risks attendant on pregnancy, including increased seizure disorder, status epilepticus and major surgery dictate that permanent birth control and maximum protection should be afforded to Cynthia.

(5) Tubal ligation, a relatively minor surgical procedure, is the only practicable birth control method which can insure against pregnancy. Other methods, although less restrictive alternatives, are not appropriate for Cynthia. She is already heavily medicated. The possible negative interaction of the pill or other hormonal drugs with her present medication should be precluded, as should additional supervised administration of drugs. Moreover, oral contraceptives to be taken daily for the next 20 years have serious potential side effects. Cynthia is not a fit candidate for barrier methods, since these must be self-monitored.

(6) A sheltered environment does not afford sufficient protection against sexual advances. Cynthia may "voluntarily" succumb to overtures which she

perceives as affection or may be the victim of an attack. Furthermore, there is no certainty that her environment will remain as protective as it is presently. The plans for "education" and supervision advanced by witnesses for the guardian ad litem, though well intentioned, presuppose ideal circumstances in which unlimited funds exist to provide maximum individual education, training and supervision. Reality falls far short of such an ideal.

Furthermore, no amount of supervision offers total protection. As Dr. Bolognese stated: "Much can be achieved in 10 to 15 minutes that can cause a pregnancy."

The guardian ad litem chooses to minimize actualities of which the Court is mindful. For example, Dr. Sternbach described a mentally retarded resident of a supervised CLA, whose late discovered

pregnancy necessitated a third trimester abortion. Dr. Heller also testified about pregnancies in women under maximum supervision in the county prison system. There are frequent media accounts of rapes in nursing homes and convents.

This Court decided the distressing case of Estate of Joyce K., (O.C. Phila. No. 3343 of 1982), involving Joyce, a profoundly retarded 33 year old woman at Ebensburg State Hospital, a maximum security facility for the mentally impaired in Cambria County. She and another patient were raped and impregnated in that institution. The Court appointed Joyce's mother as her guardian to consent to a second trimester abortion.

In Estate of Barbara G. (O.C. Phil. No. 3039 of 1989), Dr. Jeffrey Buchhalter, Professor of Neurology at the University

of Pennsylvania, and a neurologist at Children's and Graduate Hospitals testified:

> ". . . It is a matter of common knowledge that every so often someone like Barbara with significant mental retardation, with or without a seizure disorder, becomes pregnant either from a staff member of from another patient."

(7) Despite the admonition in Terwilliger that only the disabled person's interests are involved, one cannot disregard the emotional and economic toll of such a case on the family, the caretakers, counsel, experts in medicine and psychology, the court and its personnel. To ask that the Court review what, if any, form of contraception is appropriate, every year or two is to deny any remedy, as the process is extremely burdensome.

It would be patently unfair to wait another two years, and other subsequent

intervals, to rehear this case. The Court is convinced that the matter has been comprehensively and exhaustively researched and presented. To postpone the decision further would serve no one's interest.

(8) The simplistic alternative proposed by the guardian ad litem -- "Do nothing" -- is untenable.

As Dr. Heller stated when questioned by the guardian ad litem about least restrictive alternatives:

> "One should try less restrictive alternatives but not capriciously, not with the idea that one can go back to the drawing board if it doesn't work, because there are timely intervals of intervention beyond which we have missed the boat . . . . We need to avoid our tendency to rely too heavily on what we call benign neglect because neglect is not always benign."

The amicus curiae, who has filed a brief on behalf of the Disabilities Law Project, has also taken the position that

sterilization is not in Cynthia's best interest. The amicus nonetheless urges the Court to utilize the doctrine of substituted judgment as an analytical method for deciding this case. Although this doctrine does not appear to be the teaching in Terwilliger, the New Jersey Supreme Court in In Re Grady, 85 N.J. 235, 426 A.2d 467 (1981), said:

> "We believe that an appropriate court must make the final determination whether consent to sterilization should be given on behalf of an incompetent individual. It must be the court's judgment and not just the parents' good faith decision that substitutes for the incompetent's consent." (426 A.2d at 475).

In substituting this Court's judgment for that of Cynthia, who since birth has lacked capacity to make a choice, the Court must assess the wants and needs of Cynthia and determine what is in her best

interest. (In the Matter of Moe, Mass. 555, 432 N.E.2d 712 (1982)).

As to the "Do nothing" alternative, the Court is without power to enforce the close supervision, education and maintenance that Cynthia requires. Several years ago, Cynthia had the "good touch-bad touch" training. She had completely forgotten these lessons by 1988, although the program is once again being administered. It is beyond the reach of a Court to order further training, to assure funding for such programs, or to ensure that Cynthia will understand and utilize those lessons. Further, the possibility that she might be raped or, in her own way, acquiesce in or submit to sexual intercourse cannot be ruled out. Since she cannot communicate, how would anyone know if and when she had intercourse? In

the event she were to become pregnant, assuming that abortion is still legal, how could it be ascertained that the pregnancy was safely within the first trimester? How would Cynthia respond to the bodily changes of a pregnancy -- the nausea and morning sickness, the movements of the fetus, the pain and discomforts of labor and delivery? What psychological damage or trauma will result from the pregnancy or birth, or the termination of the pregnancy? How can the effects of her anti-convulsant medication or a seizure on the fetus be predicted? Assuming, against great odds, a safe delivery and a healthy infant, who would adopt the child? There are over 25, 000 young children in Philadelphia requiring foster care. What saint would take the child of Cindy and an unknown father?

How comfortable can a Court be which makes the easy decision to "do nothing"?

Admittedly, on any given day there is a greater probability, assuming that she continues to be closely supervised, that Cynthia will not become pregnant. However, the petitioner's fears and concerns that she might are not imaginary.

The decision to sterilize Cynthia rests on the advice, opinions and clear and convincing evidence of her attending physician, a psychiatrist, two gynecologists, and a psychologist, all of whom are highly qualified and concerned. Each believes that it is in her best interests to be protected from pregnancy, and recommends that the optimum method of contraception for Cynthia is a tubal ligation. All are confident that the risks are minimal, and that other

alternative contraceptive methods are not only less reliable, but possibly harmful, given her seizure condition. Further, in the purely hypothetical and implausible event that Cynthia would in the future choose to have a child, 75% of tubal ligations by mini-laparoscopies are reversible, according to Dr. Seitz, and in vitro fertilization would be an option, according to Dr. Bolognese.

If the doctrine of substituted judgment were applicable, this Court could not delude itself that its choice would be Cynthia's choice. Cynthia has never had the ability to formulate or express a meaningful choice. Nor is the Court convinced that a judge, rather than the incompetent's mother, a zealous guardian ad litem, or the many experts in psychology, psychiatry, gynecology, and related

disciplines who have expressed differing opinions will make the most compassionate and considered choice. The Court has reviewed over a score of opinions from various jurisdictions, as well as law review and medical journal articles. Although safeguards and guidelines are set forth, there is little definitive law. No reference could directly dictate the best interests of the vulnerable, fragile, unique individual who is Cynthia Wojciechowski.

The Terwilliger court's warning that the interests of the parents and society should play no part in the decision is questionable. Rarely has this Court observed such pain and devotion as was manifested by Dolores Wasiak, Cynthia's mother, both in direct examination and under harsh cross-examination. It is

apparent to the Court that the petitioner is acting in good faith and solely for the protection and best interests of her daughter. The Court fails to find a conflict of interest between Cynthia and her mother, or between Cynthia and a caring and protecting society.

Ms. Wasiak's desire to let Cynthia have as much autonomy and normalcy as possible, but beyond that to protect and shield her to the greatest extent possible is commendable. As it is appropriate that a fit parent of a five year old child should be the principal decision maker about the care and welfare of the child, it is similarly appropriate that a parent of an adult child, who, because of a disability functions as a five year old, should be the principal decision maker for that child. In the opinion of this Court,

the decision making should be primarily that of the parents and their chosen physicians and counsellors, subject to the review of the Court.

The paramount right and prerogative of a parent to make such decisions is supported by Professor Elizabeth Scott, Associate Professor and Director of the Center for the Study of Children and the Law at the University of Virginia School of Law. In her comprehensive commentary, "Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy;" Duke Law Journal, Volume 1986, 806, she concludes, at page 865:

> "The desire to correct the abuses of the past is admirable. We should only take care that in pursuing this goal, we do not create a new set of problems for the future . . . . The law's objectives are best met by leaving the sterilization decision to the retarded person who is competent to make her own reproductive choices with only as much intervention as is

> necessary to facilitate her decisions. For retarded persons who cannot make their own decisions, parents - not courts - are the best surrogates."

(9) The decision to authorize a tubal ligation for Cynthia has nothing to do with the doctrines related to compulsory eugenic sterilization, or the specter of Justice Holmes' anachronistic statement in Buck v. Bell, 274 U.S. 200 (1927) that "three generations of imbeciles are enough." This is not an instance of involuntary sterilization based on fear that Cynthia's disabilities will be inherited by her offspring. On the contrary, considering her family history and medical uncertainty as to genetic transmission of seizures or organic brain damage and retardation, it cannot be predicted that Cynthia's potential offspring would be impaired solely on a

genetic basis. The risk of fetal abnormality is not the critical consideration in reaching the conclusion to permit the tubal ligation. Questions of eugenics, public policy, societal interests and basic civil rights of retarded persons other than Cynthia Wojciechowski are wholly irrelevant to these proceedings.

(10) Tubal ligation is a simple, minimally invasive low risk, permanent and virtually 100 percent reliable method of contraception.

Before tubal ligation procedures were perfected in the 1930's, hysterectomy was the only method of permanent female sterilization. Surgical sterilization in women has changed dramatically in the past 40 years. From 1950 to 1980, the number of tubal ligations increased from three million to more than 13 million, and

during the period 1970 to 1980, an estimated 5,526,000 women, ages 15 to 54, underwent tubal sterilization procedures in the United States, in non-federal short-stay hospitals. (See: The Number One Birth Control Method Worldwide, Sexual Medicine Today, February 1981, p. 11; Tubal Sterilization Among Women of Reproductive Age, United States, Update for the 1979-1980; Morbidity and Mortality Weekly Report, Volume 32 No. 3 SS.)

The American College of Obstetricians and Gynecologists Committee on Technical Bulletins (ACOG Technical Bulletin No. 113, February 1988) reports:

> "It is estimated that over the past decade, 800,000 to 1 million or more sterilization operations have been performed yearly in the United States."

Doctors Seitz and Bolognese report that the health risks, trauma and

psychological damage attendant upon sterilization are minimal compared to the risks and trauma of abortion, pregnancy and delivery. As Professor Scott has commented, "Physicians may generally be relied on to recommend the treatment that best promotes the patient's welfare with minimal risks."

Dr. Knast, the psychologist called by the petitioner, as well as all the physicians who testified, agree that sterilization would lead to greater autonomy and normalization for Cynthia. Even Mr. McFalls, director of Ken Crest, conceded that much of Cynthia's supervision was motivated by the effort to avoid sexual activity, as much as to observe possible seizures.

The eloquent opinions of the British judges in the case of Re B (2 All ER, 2

WLR 1213, FLR 314) decided by the House of Lords on April 30, 1987, are impressive. The facts are strikingly similar. "B" was a mentally handicapped and epileptic 17 year old girl who had a mental age of five or six. She had no comprehension of reproduction, was unable to give informed consent, and would be unable to care for a child. She lived in a local authority home and spent weekends at her mother's home. Five Judgments were issued by the Lords affirming the family court's order of sterilization by occlusion of the fallopian tubes. Lord Hallsham of St. Marylebone held:

> "To talk of the 'basic right' to reproduce of an individual who is not capable of knowing the causal connection between intercourse and childbirth, the nature of pregnancy, what is involved in delivery, unable to form maternal instincts or to care for a child <u>appears to me wholly to part company with reality</u>." (underlining supplied).

In agreeing that a tubal ligation was appropriate, Lord Bridge of Harwick observed:

> ". . .This case has nothing whatever to do with Eugenic theory or with any attempt to lighten the burden which must fall on those who have the care of the ward. It is concerned, and concerned only, with the question of what will promote the welfare and serve the best interests of the ward."

These eminently logical and sensible expressions of the British Court prompt this Court to express its skepticism about the reasonableness of the opposition of the guardian ad litem to the tubal ligation.

Judicial proceedings for the authorization of sterilization are extraordinarily difficult, time consuming, expensive and stressful to all concerned. Cynthia's mother is of modest means. Her counsel has expended enormous amounts of

time on this matter, as has the guardian ad litem who serves without compensation. The prospect of serial proceedings as various improbable alternatives are tried and discarded simply because of their appeal to the over-zealous libertarian mocks the judicial process.

The basic human right to reproduce is meaningful only when such procreation is the result of informed choice. Certain retarded and mentally impaired individuals may be capable of making such a choice and their right to choose must be safeguarded. Because of organic brain damage and retardation, Cynthia is incapable of making such a choice. Thus, the loss of choice is the loss of an illusory right only. Her welfare and best interests are best promoted by providing maximum protection against pregnancy.

Accordingly, the petition to appoint Dolores Wasiak guardian of the person of Cynthia Wojciechowski to consent to her sterilization by tubal ligation is granted.

Jamison /s/
J.

DATED: February 28, 1990

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

NO. 3107 of 1987

Estate of CYNTHIA WOJCIECHOWSKI,
Alleged Incompetent

GUARDIAN'S MEMORANDUM IN SUPPORT OF HER PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

On September 4, 1987, Delores Wasiek petitioned this court for an order appointing her as guardian over the person of her daughter, Cynthia Wojciechowski, for the purpose of consenting to sterilization by tubal ligation on her daughter's behalf. On October 30, 1987 the court appointed the undersigned as Guardian Ad Litem to represent the best interests of Ms. Wojciechowski in this proceeding. Five hearings were held at which testimony for and against the propriety of the

proposed sterilization was taken. The case now stands ready for decision.

It is respectfully suggested that the present record does not support the request for sterilization and that therefore, the petition should be denied. Petitioner has failed to establish by clear and convincing evidence that sterilization is necessary in order to advance the best interests of Ms. Wojciechowski as required by Matter of Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1983). The unrebutted evidence concerning Ms. Wojciechowski's life circumstances make sterilization a far greater intrusion than necessary to protect her from pregnancy. As such, sterilization would unconstitutionally impinge upon her right to bodily integrity and her right to reproductive autonomy. For these reasons and the

reasons that follow, an order authorizing sterilization would be inappropriate, and the request for it should be rejected.

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Argument

1. Terwilliger and The Governing Legal Standards

Proposed sterilizations of the mentally retarded in Pennsylvania are strictly governed by Matter of Terwilliger, 304 Pa. Super, 553, 450 A.2d 1376 (1983). Recognizing the constitutional implications which sterilization has for a mentally retarded person, the Pennsylvania Superior Court took pains in Terwilliger, a case of first impression in the Commonwealth, to "ensure that when sterilization is sought, the incompetent's rights are jealously guarded." Id., 450 A.2d at 1382. That court held that no sterilization could be ordered without clear and

convincing proof that it is in the best interest of the mentally retarded person. This standard cannot be satisfied without strict proof that "sterilization is the only practicable means of contraception, i.e., all less drastic contraceptive methods, including supervision, education, and training are unworkable." Id., 450 A.2d at 1383. Furthermore, testimony must show that "the sterilization procedure requested is the least significant intrusion necessary to protect the interests of the individual." Id.

Although Terwilliger was the first official pronouncement by a Pennsylvania court in recent years on the sterilization issue, the decision was consistent with those of courts from other states in which the issue had been analyzed and standards developed. These cases were premised upon

two separate aspects of the constitutional right of privacy -- the right to bodily integrity and the right of procreative choice. See e.g., Matter of Moe, 385 Mass. 555, 432 N.E.2d 712 (1982). In Re Grady, 85 N.J. 235, 426 A.2d 467 (1981). Matter of CDM, 627 P.2d 607 (Alaska 1981); North Carolina Association of Retarded Children v. North Carolina, 420 F.Supp. 451 (1976). Recognition of these rights on behalf of the mentally retarded coincided with belated societal acknowledgement that the retarded are entitled to the same basic civil and constitutional rights as other citizens, and changing views concerning the capabilities of the retarded as well. By the 1970's, the negative stereotypes which previously governed our treatment of the retarded had been replaced with a developmental approach which

recognized the potential of every retarded person to grow, develop and learn. See generally Macklin & Gaylin, Mental Retardation and Sterilization (1981). Principles of normalization, which dictated that to the greatest extent possible the retarded person should be treated as if no handicap existed, and the closely allied doctrine of least restrictive alternative, through which normalization principles were implemented, became the keystones of service delivery to the mentally retarded community. See generally, Turnbill, The Least Restrictive Alternative: Principles and Practice (1981). [9] They were further reflected

[9] These principles have been adopted by both the Pennsylvania Legislature and the Pennsylvania Supreme Court for all matters relating to the mentally retarded in this case. In Re Schmidt, 494 Pa. 86,

not only in sterilization decisions nationwide, but in other cases involving the care, treatment, and education of the regarded. See e.g., Youngberg v. Romeo, 457 U.S. 307 (1982); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), 612 F.2d 84 (3d Cir. 1979), 446 F. Supp. 1295 (E.D. Pa. 1977); Rennie v. Klein, 462 F. Supp. 1131 (D. N.J. 1978), modified and remanded, 653 F.2d 836 (3d Cir. 1981). See also, In Re Schmidt, supra.

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This result was not only consistent with prior sterilization decisions, but was required by the dictates of the Fourteenth Amendment to the United States Con-

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429 A.2d 631 (1981); Mental Health Procedures Act, Act of 1976, July 0 [sic], P.L. 817, No. 143, § 101, 50 P.S. § 7101.

stitution as well. Terwilliger recognized the importance of procreational freedom, even for those mentally retarded persons unable to choose between reproductive alternatives. Clearly, where infringement upon constitutional rights is at stake, the least drastic alternative to achieve a particular purpose must be utilized. Shelton v. Tucker, 364 U.S. 479 (1960). See also, In Re Schmidt, supra (least restrictive alternative governs decisions affecting the mentally retarded in Pennsylvania).

The United States Supreme Court, too, has made clear that where educational or supervisional alternatives can reduce a mentally retarded person's need for bodily restraint, the Fourteenth Amendment requires that such methods be pursued before more restrictive alternatives are insti-

tuted. The right to bodily integrity of course, was firmly embedded in the common law [10] and has long been recognized as one of our most sacred constitutional rights. Justice Brandeis referred to it as "the right to be left alone -- the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 227 U.S. 438, 478 (1927). Freedom from arbitrary invasions of bodily integrity and personal security are at the core of the liberty protected by the Due Process Clause. Youngberg v. Romeo, 457 U.S. 307 (1982). They are implicit in the

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[10] See generally Cantor, "A Patient's Decision to Decline Life Saving Treatment: Bodily Integrity Versus the Preservation of Life", 26 Rutgers L. Rev. 228, 236 (1973). See also In Re A.C., 533 A.2d 611 (1987); In Re Gardner, 534 A.2d 947, 951 (Maine, 1987); Matter of Conroy, 486 A.2d 1209 (N.J. 1985). Matter of Moe, supra; In Re Guardianship of Grant, 747 P.2d 445 (Wash. 1988); Matter of Welfare of Colver, 660 P.2d 738 (Wash. 1983).

Fourth and Ninth Amendments as well, and are deemed to be fundamental. See generally "Federalism and Fundamental Rights: The Ninth Amendment", 38 Hastings Law J. 305 (1987). See also, Scott v. Plante, 532 F.2d 939, 946 n.9 (1976); Runnels v. Rosendale, 499 F.2d 733, 735 (9th Cir. 1974); Matter of Quinlan, 355 A.2d 647 (N.J. 1976). The right to bodily integrity is not dependent, of course, upon intellectual capacity, but is an inherent aspect of personhood not diminished in any way by mental incompetence. Youngberg; see also, Brophy v. New England Sinai Hospital, 497 N.E.2d 626 (Mass. 1986).

The U.S. Supreme Court addressed this issue in Youngberg v. Romeo, supra, in which the issue presented involved the restrictiveness of a mentally retarded man's program at Pennhurst State School

and Hospital. Nicholas Romeo, who had an I.Q. of 8 or 9, was constantly placed in physical restraints which caused him to hurt himself and left him open to abuse by other patients. Mr. Romeo's mother sued Pennhurst, alleging that its treatment of her son violated his right to be free from bodily restraint, and arguing that with appropriate education Mr. Romeo would require far less restrictive treatment. The Supreme Court required training in order to protect Mr. Romeo's liberty interests in safety and a minimum of physical restraint, since with appropriate education his behavior could be improved, enabling him to participate in the therapeutic community under less restrictive circumstances. Id., 457 U.S. at 319.

This principle is just as applicable in the sterilization context, as Terwil-

liger and its predecessors implicitly recognized. Where educational and/or supervisional programs can be utilized to increase a mentally retarded person's level of social functioning, and thereby reduce the risk of pregnancy, and thus the need for contraception of an kind, such methods must be employed. Surgical alternatives are simply not warranted under such circumstances, and by definition are not least restrictive. [11] Likewise, if contraceptive methods are available which could provide pregnancy effectively and more normatively without the need for bodily invasion, sterilization is not the least restrictive alternative. This was

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[11] The fact that the tubal ligation is a relatively simple operation under ordinary circumstances is irrelevant to this analysis. Any invasion of the body which can be avoided by appropriate education and/or supervision is inappropriately restrictive.

the case with sexually active Mildred Terwilliger. As will be discussed more fully below, it is also true with Cynthia Wojciechowski, who is not sexually active, and whose chances of becoming pregnant in the foreseeable future were conceded by petitioner's own experts to be slight.

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

NO. 3107 of 1987

Estate of CYNTHIA WOJCIECHOWSKI,
Alleged Incompetent

GUARDIAN'S EXCEPTIONS
TO OPINION AND ORDER

Cynthia Wojciechowski, through her Guardian Ad Litem, Lorrie McKinley, Esquire, hereby makes the following exceptions to the February 28, 1990 opinion and order of the Honorable Judith Jamison which authorized Ms. Wojciechowski's mother, Delores Wasiek, to consent to a laparoscopic tubal ligation on her behalf:

1. The opinion and order contravene controlling principles announced in In Re Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1983) and In Re Rubis, Fid. Rep. 412 (1984), both of which prohibit steriliza-

tion of an incompetent without clear and convincing evidence that sterilization is the only practicable means of contraception; i.e. "that all less drastic contraceptive methods, including supervision, education, and training are unworkable: and that "the sterilization procedure requested is the least significant intrusion necessary to protect the interests of the individual". The court's rejection of less restrictive methods of pregnancy prevention, including education, supervision, and training, was not supported by clear and convincing evidence. See also In Re Schmidt, 494 Pa. 86, 429 A.2d 631 (1981) (requiring least restrictive alternatives in all matters affecting the mentally regarded).

2. The opinion and order further disregard Ms. Wojciechowski's constitu-

tional rights of bodily integrity and reproductive autonomy as defined by the United States Supreme Court. See e.g. Youngberg v. Romeo, 457 U.S. 307 (1982), Roe v. Wade, 410 U.S. 113 (1973).

3. The opinion and order, being contrary to law and fact, are not in Ms. Wojciechowski's best interest.

Respectfully submitted,

/s/
LORRIE McKINLEY
Guardian Ad Litem for
Cynthia Wojciechowski

Date: March 7, 1990

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

NO. 3107 of 1987

Estate of CYNTHIA WOJCIECHOWSKI,
Alleged Incompetent

GUARDIAN'S MEMORANDUM IN SUPPORT OF EXCEPTIONS TO TRIAL COURT'S TO OPINION AND ORDER

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4. The Court's Decision Failed To Acknowledge or Protect Ms. Wojciechowski's Constitutional Rights to Bodily Integrity and Reproductive Autonomy.

The Trial court in its decision failed to acknowledge at all Ms. Wojciechowski's liberty interest in bodily integrity and characterized her right to reproductive autonomy as "illusory". Adopting the wording of a 1987 decision by the House of Lords, the Judge concluded that:

> To talk of the "basic right" to reproduce of an individual who is not capable of knowing the causal connection between intercourse and childbirth, the

> nature of pregnancy, what is involved in delivery, unable to form maternal instincts or to care for a child appears to me wholly to part company from reality. (underlining supplied by trial court)

One would search in vain for an American decision during the past twenty years which so cavalierly disposes of an incompetent's right to reproductive autonomy. The numerous American courts, including Terwilliger, which have addressed this issue have been unanimous in their concern for this basic freedom. It is precisely because the sterilization decision impinges so directly on a constitutional right that the least restrictive alternative approach was adopted in such cases. Beginning with Shelton v. Tucker, 364 U.S. 479 (1960) the Supreme Court had required this approach where infringement upon constitutional rights is at stake.

The United States Supreme Court has made clear that where educational or supervisional alternatives can reduce a mentally retarded person's need for bodily restraint, the Fourteenth Amendment requires that such methods be pursued before more restrictive alternatives are instituted. This is premised upon the right to bodily integrity, which of course, was firmly embedded in the common law. [24] Although it is not specified in the Constitution, it is an aspect of the right to privacy which arises from the penumbras of the First, Third, Fourth, Fifth and

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[24] See generally Cantor, "A Patient's Decision to Decline Life Saving Treatment: Bodily Integrity Versus the Preservation of Life", 26 Rutgers L. Rev. 228, 236 (1973). See also In Re A.C., 533 A.2d 611 (1987); In Re Gardner, 534 A.2d 947, 951 (Maine, 1987); Matter of Conroy, 486 A.2d 1209 (N.J. 1985). Matter of Moe, supra; In Re Guardianship of Grant, 747 P.2d 445 (Wash. 1988); Matter of Welfare of Colver, 660 P.2d 738 (Wash. 1983).

Ninth Amendments. Freedom from arbitrary invasions of bodily integrity and personal security are thus within the core of the liberty protected by the Due Process Clause. Youngberg v. Romeo, 457 U.S. 370 (1982). Justice Brandeis referred to this as "the right to be left alone -- the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 227 U.S. 438, 478 (1927). Accord, Union Pacific Ry Co. v. Botsford, 141 U.S. 250 (1891). See generally "Federalism and Fundamental Rights: The Ninth Amendment", 38 Hastings Law J. 305 (1987). See also, Scott v. Plante, 532 F.2d 939, 946 n9 (1976); Runnels v. Rosendale, 499 F.2d 733, 735 (9th Cir. 1974); Matter of Quinlan, 355 A.2d 647 (N.J. 1976); Foody v. Memorial Hospital, 482 A.2d 713 (Conn. Super. 1984). The right

to bodily integrity is not dependent, of course, upon intellectual capacity, but is an inherent aspect of personhood not diminished in any way by mental incompetence. Youngberg; see also, Brophy v. New England Sinai Hospital, 497 N.E.2d 626 (Mass. 1986).

Although the principle of least restrictive alternative and its nexus with the right to bodily integrity was not squarely presented in Youngberg, the facts presented there and the Court's analysis are instructive here. The case involved the restrictiveness of a mentally retarded man's program at Pennhurst State School and Hospital. Nicholas Romeo, who had an I.Q of 8 or 9, was constantly placed in physical restraints which caused him to hurt himself and left him open to abuse by other patients. Mr. Romeo's mother sued

Pennhurst, alleging that its treatment of her son violated his right to be free from bodily restraint, and arguing that with appropriate education Mr. Romeo would require far less restrictive treatment. The Supreme Court required training in order to protect Mr. Romeo's liberty interests in safety and a minimum of physical restraint, since with appropriate education his behavior could be improved, enabling him to participate in the therapeutic community under less restrictive circumstances. Id., 457 U.S. at 319.

This principle is just as applicable here, as Terwilliger recognized. Where educational and/or supervisional programs can reasonably be expected to increase a mentally retarded person's level of social functioning, and thereby reduce the risk of pregnancy, and thus the need for con-

traception of any kind, such methods must be employed and found unworkable prior to any order for sterilization. Surgical alternatives are simply not warranted under such circumstances. By definition they constitute an unjustified intrusion upon the mentally retarded person's right to bodily integrity and can never be least restrictive.

The relative ease with which a tubal ligation can generally be performed does not negate this conclusion. Any invasion of the body which can be avoided by appropriate education and supervision is inappropriately restrictive and intrusive upon constitutional rights. In this case, Ms. Wojciechowski's rights to bodily integrity and procreative autonomy may not be cast aside on the theory that the unnecessary intervention can be easily performed.

Terwilliger prohibits such a result absent a clear and convincing showing that no other alternative, including education, supervision, and training, can provide Ms. Wojciechowski with effective pregnancy protection. The Fourteenth Amendment requires no less, and no such showing has been made here. Since the trial court's opinion fails to comport with these principles, its judgment must be reversed.

IN THE SUPERIOR COURT OF PENNSYLVANIA

IN RE: Estate of Cynthia Wojciechowski,
an alleged incompetent

No. 02970PHL91

BRIEF FOR THE APPELLANT

Appeal From The Order Of The Court
Of Common Pleas Of Philadelphia
County, Orphan's Court Division,
Docket No. 3107 of 1987

Lorrie McKinley, Esquire
Guardian Ad Litem for
Cynthia Wojciechowski

Penn Legal Assistance Office
International house, 6W
3701 Chestnut Street
Philadelphia, PA 19104
(215) 898-8427

December 2, 1991
Resubmitted November 9, 1993

STATEMENT OF QUESTIONS INVOLVED

1) Did The Orphan's Court En Banc inappropriately apply Matter of Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1983), when it granted petitioner's request for sterilization absent evidence that all less drastic means [of contraception], including education supervision, and training, are unworkable?

2) Did the Orphan's Court En Banc by its order granting petitioner's request for sterilization of the appellant violate the appellant's constitutional right of privacy, including her right to bodily integrity and reproductive autonomy?

STATEMENT OF THE CASE

This case comes before the Superior Court en banc on appeal from the August 1,

1991 opinion and decree of the Court of Common Pleas of Philadelphia County, Orphans' Court Division En Banc, which granted petitioner the authority to consent to tubal ligation on behalf of Cynthia Wojciechowski, the appellant in this action. Ms. Wojciechowski, through her undersigned guardian ad litem, seeks reversal of the court's order since it is contrary to law and unsupported by the record. Specifically, the court erred by concluding that clear and convincing evidence exists that sterilization is necessary to advance the best interests of Cynthia Wojciechowski as required by Matter of Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1983). Terwilliger is of course controlling here. Furthermore, the court's opinion fails to protect Ms. Wojciechowski's constitutional right to

privacy by impinging upon her interests in bodily integrity and procreative autonomy. These errors of law require that the trial court's opinion be reversed.

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ARGUMENT

I. Introduction

Proposed sterilizations of the mentally retarded in Pennsylvania are strictly governed by Matter of Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1983). Recognizing the constitutional implications which sterilization has for persons with mental retardation, this Court took pains in Terwilliger, a case of first impression in the Commonwealth, to "ensure that when sterilization is sought, the incompetent's rights are jealously guarded." Id., 450 A.2d at 1382. The court held that no sterilization can be

ordered without clear and convincing proof that it is in the best interest of the mentally retarded person. This standard cannot be satisfied without strict proof that "sterilization is the only practicable means of contraception, i.e., all less drastic contraceptive methods, including supervision, education, and training are unworkable." Id. 450 A.2d at 1383. Furthermore, testimony must show that "the sterilization procedure requested is the least significant intrusion necessary to protect the interests of the individual."

The decision of the Orphans' Court falls far short of establishing that the sterilization of sexually inactive and highly supervised Cynthia Wojciechowski meets Terwilliger's exacting standard. While the Court purported to apply Terwil-

liger, many of its most crucial findings are not supported by the record. Its reliance upon such findings to authorize the sterilization at issue here contravenes the teachings of Terwilliger and trammels upon Ms. Wojciechowski's constitutional right to privacy. As such, the lower court's ruling must be reversed.

II. Terwilliger and The Right to Privacy

Although Terwilliger was the first official pronouncement by a Pennsylvania court in recent years on the sterilization issue, it was consistent with decisions from other states in which the issue had been analyzed and standards developed. These cases were premised upon two separate aspects of the constitutional right of privacy -- the right to bodily integrity and the right of procreative choice. See e.g., Matter of Moe; 385 Mass. 555, 432

N.E.2d 712 (1982); In Re Grady, 85 N.J. 235, 426 A.2d 467 (1981); Matter of CDM, 627 P.2d 607 (Alaska 1981); North Carolina Association of Retarded Children v. North Carolina, 420 F. Supp. 451 (1976). Recognition of these rights on behalf of persons with mental retardation coincided with belated societal acknowledgement that persons with retarda-tion are entitled to the same basic civil and constitutional rights as other citizens, and changing views concerning the capabilities of persons with retardation as well. By the 1970's, the negative stereotypes which previously governed our treatment of persons with retardation had been replaced with a developmental approach which recognized the potential of every retarded person to grow, develop and learn. See generally Mackin & Gaylin, Mental

Retardation and Sterilization (1981). Principles of normalization, which dictated that to the greatest extent possible the person with retardation should be treated as if no handicap existed, and the closely allied doctrine of least restrictive alternative through which normalization principles were implemented, became the keystones of service delivery to the mentally retarded community. See generally, Turnbull, The Least Restrictive Alternative: Principles and Practice (1981). They were further reflected not only in sterilization decisions nationwide, but in other cases involving the care, treatment, and education of the retarded. See e.g., Youngberg v. Romeo, 457 U.S. 307 (1982); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), 612 F.2d 84

(3d Cir. 1979), 446 F. Supp. 1295 (E.D. Pa. 1977); Rennie v. Klein, 462 F.Supp. 1131 (D.N.J. 1978), modified and remanded, 653 F.2d 836 (3d Cir. 1981). Prior to Terwilliger the Pennsylvania legislature and Supreme Court determined that these principles should govern all matters relating to the mentally retarded in this state. In Re Schmidt, 494 Pa. 86, 429 A.2d 631 (1981); Mental Health Procedures Act, Act of 1976, July 8, P.L. 817, No. 143, § 101, 50 P.S. § 7101.

Against this backdrop Terwilliger required that any proposed sterilization be proven by clear and convincing evidence as the least restrictive alternative for the individual. By definition, any alternative not the least restrictive of the individual's capacities and/or potential for growth could not be in the

person's best interest. This view was consistent with previously decided sterilization cases and has been adopted by subsequent courts as well. E.g., In Re Grady, supra; In Re: Hillstrom, 363 N.W.2d 871 (Minn. 1985).

In addition to its consistency with state law and the views of other courts, the result in Terwilliger was constitutionally required. At least since Shelton v. Tucker, 364 U.S. 479 (1960), where infringement upon fundamental rights is concerned, the least restrictive means must be utilized by courts and governmental entities in pursuit of legitimate objectives to preserve as far as possible individual liberty. See also NAACP v. Alabama, 377 U.S. 288 (1964); Rennie v. Kline, 653 F.2d 836 (3d Cir. 1982);

Sinmark Associates v. Township of Willingboro, 535 F.2d 786 (3d Cir. 1976). In other words, the government can do no more than is necessary to accomplish its objective. There can be no question that the sterilization of a person with mental retardation permanently extinguishes the right to procreate, a fundamental constitutional interest, and at the same time impinges upon another fundamental privacy right, the right to bodily integrity. See e.g., Winston v. Lee, 470 U.S. 753 (1984); Matter of Moe, 385 Mass. 555, 432 N.E.2d 712 (1982); In re Grady, 85 N.J. 235, 426 A.2d 467 (1981); Matter of CDM, 627 P.2d 607 (Alaska 1981); Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976); North Carolina Association of Retarded Children v. North Carolina, 420 F. Supp. 451 (1976).

As such, the least restrictive alternative approach is constitutionally mandated. Justice Brandeis described the right to bodily integrity as "the right to be left alone -- the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 227 U.S. 438, 478 (1927). Accord, Union Pacific Ry Co. v. Botsford, 141 U.S. 250 (1891). See generally "Federalism and Fundamental Rights: The Ninth Amendment", 38 Hastings Law J. 305 (1987). See also, Scott v. Plante, 532 F.2d 939, 946 n9 (1976); Runnels v. Rosendale, 499 F.2d 733, 735 (9th Cir. 1974); Matter of Quinlan, 355 A.2d 647 (N.J. 1976); Foody v. Memorial Hospital, 482 A.2d 713 (Conn. Super. 1984).

The constitutional interest in bodily integrity, sometimes referred to as per-

sonal autonomy or freedom from non-consensual bodily invasion, belongs to both competent and incompetent individuals. Cruzan v. Missouri Department of Health, ___ U.S. ___, 110 S.Ct. 2481 (1990), Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976). As stated in Browning v. Herbert, 568 So.2d 4 (Fla. 1990): "the primary concern ... is that this valuable right should not be lost because the ... condition of the patient prevents a conscious exercise of the choice to refuse ... treatment." Accord, Quinlan, 355 A.2d at 664. See also, Youngberg, supra; Brophy v. Mount Sinai Hospital, 497 N.E.2d 626 (Mass. 1986); Terwilliger, supra.

Indeed, it is the fact of Ms. Wojciechowski's incompetence, and that of others like her, which makes the right to bodily integrity so significant. The most power-

less numbers of society need to rely most on constitutional barriers against bodily intrusion because they are unable to communicate decisions concerning their wishes. The significance of their rights can be easily trivialized by those in a position to make those decisions for them, even despite the most benign motives.

This problem was well exemplified at several points during the trial in this case. It was the singular fact of Ms. Wojciechowski's mental retardation that led petitioner's experts to recommend the invasive sterilization procedure rather than some less restrictive alternative. Without exception, petitioner's experts conceded that with a medical profile identical to Ms. Wojciechowski's, they would not recommend sterilization for a woman who was not mentally retarded. N.T. at

110, 213-214, 248. See also N.T. 8/17/89 at 59-60. This undermines completely the testimony given by these experts as to the urgency of sterilization to protect Ms. Wojciechowski from untoward medical consequences, and demonstrates how something which would be considered a dramatic invasion on the personhood of one with normal intelligence is seen as not significant to the person with retardation. This distinction is even more stark, considering the fact that the normal person would have the opportunity to consent to the procedure, where there can be no consent here. So reluctant would these experts be to effectuate such an extinguishment of a fundamental right, that they would not recommend or perform the procedure even if requested by a normal adult of Ms. Wojciechowski's age.

The trial court's treatment of the issue suffered from the same insensitivity to the significance of Ms. Wojciechowski's right to privacy. As did the court En Banc, the trial court failed to acknowledge any interest Ms. Wojciechowski might have to bodily integrity. Her perception that Ms. Wojciechowski's right to procreative autonomy was illusory, and the ease with which that right could be extinguished, were dispositive for the trial judge. Obviously, this misses the point. Any invasion of the body to accomplish something which can just as effectively be achieved through education and supervision is inappropriately restrictive and intrusive upon the right to bodily integrity, which is not diminished in any way by the fact of incompetence. See Youngberg, supra (where training could reduce the

level of bodily restraint and permit functioning with fewer restrictions, it must be provided).

JB

ORIGINAL

Supreme Court, U.S.
FILED
JAN 17 1995
OFFICE OF THE CLERK

No. 94-892

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Loralyn McKinley, Esquire, Guardian
Ad Litem for C.W., Petitioner

v.

Delores Wasiek, Respondent

SUGGESTION OF MOOTNESS AND REQUEST FOR VACATUR

Loralyn McKinley
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TABLE OF CITATIONS

DeFunis v. Odegaard, 416 U.S. 312 (1974) 1

Garvin v. Cochran, 371 U.S. 27 (1962) 1

Massachusetts v. Oakes, 491 U.S. 572 (1989) 2

Riley v. International Brotherhood of Teamsters, 336 U.S. 930 (1949) 3

United States Bancorp Mortgage Co. v. Bonner Mall Partnership, ___ U.S. ___, 115 S. Ct. 386 (1994) ... 2

United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesselschaft, 239 U.S. 466 (1916) 2

SUGGESTION OF MOOTNESS AND REQUEST FOR VACATUR

Loralyn McKinley, Guardian Ad Litem for C.W., submits this Suggestion of Mootness to the Court for its consideration, and respectfully urges the Court, should it determine that the case is moot, to vacate and dismiss the judgment below. A Petition for Writ of Certiorari was filed with the Court on November 15, 1994 seeking review of an order of the Pennsylvania Superior Court which authorized the surgical sterilization of C.W., who has retardation. The Guardian Ad Litem sought to prevent the sterilization on the ground that the Superior Court's decision contravened C.W's Fourteenth Amendment rights to bodily integrity and procreative autonomy.

On November 10, 1994, prior to the filing of the Petition for Writ of Certiorari, the Guardian Ad Litem filed an Application for Stay of Mandate Pending Petition for Certiorari. Justice David Souter, sitting as Circuit Justice for the Third Judicial Circuit, denied the stay. The next day, November 11, 1994, a Renewed Application for Stay was filed with Justice Ruth Bader Ginsburg, who referred the request to the full Court. By order dated November 28, 1994, the request was denied.

The Guardian Ad Litem was informed by the media on January 5, 1994 that C.W. had been sterilized on December 30, 1994 at an undisclosed location. She received official notification from counsel for the Respondent on January 11, 1994 that the procedure had been performed.

The Petition for Writ of Certiorari raised critical questions

pertaining to C.W.'s constitutional right to privacy. The importance of these issues transcended her individual legal and factual situation, and had implications for thousands of persons with cognitive disabilities, as well as for others who might eventually suffer incapacity and be subject to surrogate medical decisionmaking. It is clear, however, that no matter how the Court might decide the constitutional questions raised by the petition, the specific harm sought to prevented through the petition, the sterilization of C.W., has already come to pass and cannot be undone.

Article III jurisdiction does not lie where there is no live case or controversy between the parties. Where intervening events preclude the Court from rendering a decision with any practical import for the litigants, the Court has considered the case moot and has declared itself without jurisdiction. See eg. DeFunis v. Odegaard, 416 U.S. 312 (1974). Counsel suggest to the Court that the sterilization of C.W. renders moot the issues presented in the Petition for Writ of Certiorari.

Should the Court determine that the case is moot, the Guardian Ad Litem respectfully urges the Court to vacate the decision below and dismiss the case. Vacatur is appropriate when cases emanating from the state courts become moot pending the disposition of a petition for writ of certiorari. See Massachusetts v. Oakes, 491 U.S. 572, 585 (1989). See also Defunis, supra, 416 U.S. at 320 (case mooted by graduation of litigant seeking admission to law school). See also Garvin v. Cochran, 371 U.S. 27 (1962)(case

mooted by death of petitioner); Riley v. International Brotherhood of Teamsters, 336 U.S. 930 (1949). While the Court typically vacates the judgment and remands to the state court for appropriate proceedings, where as here no state or federal claim survives mootness, remand is unnecessary and dismissal is appropriate. Massachusetts v. Oakes, supra, 491 U.S. at 585, and cases cited therein.

The equitable tradition of vacatur rests upon the premise that a party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance or the unilateral action of the party who prevailed below, "ought not in fairness be forced to acquiesce in the judgment". Id. at 391. Accord United States v. Hamburg-Amerikanische Packetfahrt-Actien Gessellschaft, 239 U.S. 466, 477-8 (1916). C.W. and her attorneys were powerless to protect her from the unilateral action of the Respondent which caused her to be sterilized prior to the Court's disposition of the Petition for Writ of Certiorari. The constitutionality of that sterilization, however, was still being contested at the time the procedure was performed, and was not put to rest by the performance of the procedure.

The Court has utilized vacatur where it is "most consonant to justice in view of the conditions and circumstances of the particular case". Id. at 477. It is especially appropriate in a case such as this one, in which C.W. had no control over the unilateral action of the Respondent which caused the case to become moot. United States Bancorp Mortgage Co. v. Bonner Mall

Partnership, ___ U.S. ___, 115 S. Ct. 386 (1994). Through her counsel and Guardian Ad Litem, she did all that could be done to prevent the case from becoming moot and to move the appeal forward. C.W., who is unable to comprehend the issue at hand, was unaware of the implications of the surgery to which she was subjected and incapable of granting or witholding consent on her own. The disposition of the sensitive and important constitutional issues implicated in her case should not be permitted to rest upon unilateral action of a single individual intent upon evading this Court's review.

WHEREFORE, C.W., through her undersigned counsel and Guardian Ad Litem, respectfully suggests that the issues presented in her Petition for Writ of Certiorari are moot. Should the Court determine that the case is moot, C.W. respectfully requests that the judgment below be vacated and the case dismissed.

Respectfully submitted,

LORALYN McKINLEY
Guardian Ad Litem for C.W.
(Counsel of Record)

COMMUNITY LEGAL SERVICES, INC.
1424 Chestnut Street
Philadelphia, PA 19102
(215) 981-3700

Matthew Strickler
Leslie Smith
1745 Market Street
Philadelphia, PA 19102
(215) 665-8500

COMMUNITY LEGAL SERVICES, INC.

1424 CHESTNUT STREET
PHILADELPHIA, PA 19102
215-981-3700
FAX 215-981-0434

RT

January 17, 1995

William K. Suter
Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

RE: C.W., By Her Guardian Ad Litem,
Loralyn McKinley, Esquire v.
Delores Wasiek, No. 94-892

Dear Mr. Suter:

Enclosed for filing please find an original and twelve documents entitled Suggestion of Mootness and Request for Vacatur. Also enclosed is Proof of Service upon counsel for the Respondent.

Very truly yours,

Loralyn McKinley

Loralyn McKinley

cc: Marta Engdahl, Esquire
Matthew M. Strickler, Esquire
Leslie H. Smith, Esquire

No. 94-892

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

C.W., By Her Guardian Ad Litem,
Loralyn McKinley, Esquire, Petitioner,

v.

Dolores Wasiek, Respondent

On Petition for a Writ of Certiorari
To the Superior Court of Pennsylvania

PROOF OF SERVICE

I hereby certify that pursuant to Rule 29.3 of the Rules of the Supreme Court of the United States, I have served three copies of the Suggestion of Mootness and Request for Vacatur by first class United States mail, upon counsel for respondent as follows:

Marta Engdahl, Esquire
P. O. Box 6994
Charlottesville, VA 22906
(804) 984-1787

I further certify that all parties entitled to be served with a copy of this motion have been served.

Loralyn McKinley

LORALYN McKINLEY
Counsel of Record

Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, PA 19102
(215) 981-3814

DATED: January 17, 1995

RECEIVED
JAN 31 95

Supreme Court, U.S.
FILED
FEB 10 1995
OFFICE OF THE CLERK

No. 94-892

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER, 1994

RECEIVED
FEB 9 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Loralyn McKinley, Esquire, Guardian
Ad Litem for C. W., Petitioner

v.

Delores Wasiek, Respondent

RESPONSE TO GUARDIAN'S

SUGGESTION OF MOOTNESS AND REQUEST FOR VACATUR

Marta Engdahl, Esquire
Counsel for Respondent

P. O. Box 6994
Charlottesville, Virginia
22906

(804) 984 1787

TABLE OF CITATIONS

STATUTES:

28 U.S.C. 2601 2

Title 20, Pennsylvania Consolidated Statutes, Section 5521 Decedents, Estates and Fiduciaries)) 3

CASES:

Izumi Seimitsu Kogyo Kubushiki Kaisha v. U. S. Phillips Corp., 510 U. S. ____, ____, 114 S. Ct. 425, 428, 126 L. Ed. 2d 396 (1993) 4

Plumbers and Steamfitter's Union, Local #598 V. Dillion, 255 F. 2d 820, C. A. Wash., 1958 4

United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesselschaft, 239 U.S., 466, 36 S.C. 212, 60 L.Ed. 387 4

United States Bancorp Mortgage Co. v. Bonner Mall Partnership, ____ U. S.____, 115 S. Ct. 386 (1994) 2, 4

Loralyn McKinley, Esquire, Guardian
Ad Litem for C. W., Petitioner

v.

Delores Wasiek, Respondent

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER, 1994
No. 94-892

RESPONSE TO GUARDIAN'S
SUGGESTION OF MOOTNESS AND REQUEST FOR VACATUR

Respondent, Delores Wasiek, replies as follows to the Guardian's Suggestion of Mootness and Request for Vacatur:

The tubal ligation procedure which was the subject of the initial court proceeding in the Orphan's Court of Philadelphia County, Pennsylvania initially requested in December, 1987, was accomplished without incident on December 30, 1994, following the Order of the U. S. Supreme Court dated November 28, 1994, denying the Guardian's Re-Application for Stay pending Appeal. Copies of the available medical records are attached.

Counsel for the Respondent was notified by letter dated January 9, 1995, and so notified the Guardian ad Litem on January 12, 1995, and the Clerk of the U. S. Supreme Court on January 17, 1995, suggesting that the issue is moot and dismissal is

appropriate, and attaching pertinent medical records.

Following receipt of the Petitioner's Suggestion of Mootness and Request for Vacatur, the Respondent opposes the Petitioner's Request for Vacatur as inappropriate.

Pursuant to 28 U.S.C. 2601, the court may vacate proceedings. This language is permissive, not obligatory. However, such action is an extraordinary remedy and requires exceptional circumstances and such action should serve the interests of justice. U. S. Bancorp Mortgage Co. v. Bonner Mall Partnership, ____ U.S. ____, 115 S. Ct. 386 (1994).

This case was begun in 1987 and, at each stage of the appellate process, the Guardian Ad Litem has requested a Stay of the proceedings. A Request for Stay is based, in part, on the likelihood of success on appeal. The Pennsylvania Supreme Court denied both the request for Stay Pending Appeal and subsequently denied the Petition for Writ of Certiorari.

The requested tubal ligation procedure was not a matter of happenstance, but was accomplished pursuant to Order of this Court. Such a decision to deny the Guardian Ad Litem's Re-Application for Stay Pending Appeal was made in full contemplation and recognition of the consequences of the

decision, i.e., that the requested tubal ligation was therefore going to become accomplished. This action was not unilateral but was taken pursuant to denial of the Guardian's Re-Application for Stay. Although the issue of tubal ligation then became moot, it did not become as if the controversy had never arisen or had never been litigated. The case should not be obliterated.

Subsequent to the initiation of this case before the Orphan's Court in Philadelphia, in 1992, and prior to the Oral Reargument before the Superior Court of Pennsylvania *en banc*, the Pennsylvania State Legislature passed legislation concerning this issue. (Title 20, Pennsylvania Consolidated Statutes, Section 5521 (Decedents, Estates and Fiduciaries)). Thereafter, the Pennsylvania Attorney General's Office was notified of the proceedings in this case. Such statutory authority is cited in the Opinion of the Superior Court of Pennsylvania. This case has become part of the case law and should not be vacated.

This case has been vigorously and fully and fairly litigated at each stage of the proceedings, from the initial Trial Court proceeding in which there were seven days of trial. The lower courts have written well-reasoned opinions based on the facts in controversy. The Supreme Court of Pennsylvania which determined to not review the case and which upheld the order of the Trial

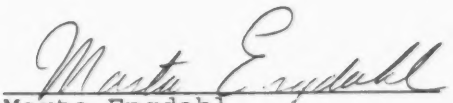
Court should be the final word on cases emanating from its courts.

The Supreme Court of the United States should not rush to vacate a State Court decision. The occasion to do so is rare. United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesselschaft, 239 U.S., 466, 36 S.C. 212, 60 L.Ed. 387, Plumbers and Steamfitter's Union, Local #598 V. Dillion, 255 F. 2d 820, C. A. Wash., 1958. Mootness can arise as a result of settlement of a case but a case should not be vacated because the issues are moot. U. S. Bancorp. Mortgage Co. v. Bonner Mall, *supra*.)

The petitioner must show equitable entitlement to the extraordinary remedy of vacatur as well as that such a decision would serve the public interest. U. S. Bancorp. Mortgage Co. v. Bonner Mall, *supra*.) Judicial precedents are presumptively correct and valuable to the legal community as a whole and should stand unless a court concludes that the public interest would be served by a vacatur. No such argument has been offered or shown. It is inappropriate to vacate mooted cases which action then leaves an assumption about the merits of the case. Izumi Seimitsu Kogyo Kubushiki Kaisha v. U. S. Phillips Corp., 510 U. S. ____, ____, 114 S. Ct. 425, 428, 126 L. Ed. 2d 396 (1993).

WHEREFORE, respondent, through counsel, respectfully requests that the Court dismiss the case as moot and deny the Guardian's Request for Vacatur.

Respectfully submitted,



Marta Engdahl
Counsel for Rspondent

P. O. Box 6994
Charlottesville, Virginia
22906
(804) 984 1787

01-09-1995 11:33 P.01

VANGUARD
OB/GYN SERVICES

One Penn Boulevard
Suite 100
Philadelphia, PA 19144
215-848-5500 Fax 215-848-3820

PATIENT'S NAME Cortman DATE _____

___ PLEASE BE ADVISED THAT THE ABOVE NAMED PATIENT WAS SEEN IN MY OFFICE TODAY FORN AN EXAMINATION

___ THE ABOVE PATIENT IS PRESENTLY _____ PREGNANT WITH AN ESTIMATED DATE OF COMFINEMENT OF _____.

___ PLEASE BE ADVISED THAT THE ABOVE NAMED PATIENT IS UNDER MY CARE AND MAY RESUME WORK ON _____.

___ THE ABOVE PATIENT HAS BEEN UNDER MY CARE FROM _____ TO _____ AND CAN RESUME NORMAL ACTIVITES.

___ PLEASE BE ADVISED THAT THE ABOVE NAMED PATIENT IS PRESENTLY UNDER MY CARE AND WILL BE OUT OF WORK FOR _____.

___ PLEASE BE ADVISED THAT THE ABOVE NAMED PATIENT WILL BE HAVING SURGE ON _____ AND MAY RETURN TO WORK ON _____ UNLESS WE NOTIFY YOU OF A CHANGE.

OTHER COMMENTS Mrs. L _____ is a patient of mine whom I performed a tubal ligation on 12-30-94. This is a minor surgical procedure, the patient is discharged on the day of procedure.

THANK YOU,

N. E. Sloane

NEIL E. SLOANE, M.D.
PHILIP J. HORN, M.D.
JUANITA BURTON, M.D.

INFORMATION
215/951-8731

CENTRAL OUTPATIENT REGISTRATION
215/951-8932

The Germantown Hospital and Medical Center

ONE PENN BOULEVARD ■ PHILADELPHIA, PENNSYLVANIA 19144

PATIENT INFORMATION

ACCOUNT NO. G001806106
TYPE PRE SDC

REGISTRATION DATE 12/30/94
REGISTRATION TIME
LOCATION SAME DAY SURGERY

MEDICAL RECORD NO. M0331584
FINANCIAL CLASS HEALTH MAINT
SOCIAL SECURITY NO. 182-54-4076

PATIENT

NAME
STREET W ,CYNTHIA
5428 N 2ND ST
CITY/STATE/ZIP PHILA,PA 19120
PHONE 224-4240
COUNTY PHILADELPHIA COUN

D.O.B. 07/06/68
AGE 26
SEX F
RACE WHITE
RELIGION CHRISTIAN
MAR. STS. SINGLE

PATIENT EMPLOYER

NAME
STREET
CITY/STATE/ZIP
PHONE

EMPLOYMENT STATUS:

GUARANTOR

NAME
STREET W ,CYNTHIA
5428 N 2ND ST
CITY/STATE/ZIP PHILA,PA 19120
PHONE 224-4240
SOCIAL SEC. NO. 182-54-4076

NEXT OF KIN

NAME BAKER,PAULINE
STREET 5428 N 2ND ST
CITY/STATE/ZIP PHILA,PA 19120
PHONE 224-4240
RELATIONSHIP OTHER

GUARANTOR EMPLOYER

NAME
STREET
CITY/STATE/ZIP
PHONE

INSURANCE

	POLICY NUMBER	GROUP NUMBER	SUBSCRIBER
USHC	WDG46010		W ,CYNTHI

PRE AUTHORIZATION 5418089

REASON FOR VISIT VOL STERILIZATION/LAP TUBAL LIGATION/123094

REFERRING PHYSICIAN TELEPHONE NUMBER

REMARKS Sloane,Neil E. (215) 848-5500

REGISTRAR

PRE & PATS THIS # 122794 ANCO PA10410790

12/30/94 COR# G001806106
W ,CYNTHIA
Time MR# M0331584

12/30/94 COR# G001806106
W ,CYNTHIA
Time MR# M0331584

12/30/94 COR# G001806106
W ,CYNTHIA
Time MR# M0331584

The Germantown Hospital and Medical Center

ONE PENN BOULEVARD ■ PHILADELPHIA, PENNSYLVANIA 19144

TYPE OF ADMISSION
- ☑ SURGICAL DAY CARE
- ☐ POST OPERATIVE
- ☐ REGULAR
- ☐ TREATMENT ROOM

PRE-REGISTRATION TEST REQUEST FORM

ATIENT INFORMATION

DATE OF SURGERY/ADMISSION 12/30/94

ME Cynthia W DATE OF BIRTH 7/6/68 SOCIAL SEC. NO. 182-54-4076

DRESS 5428 N. 2nd St TELEPHONE (HOME)

Y/STATE/ CODE Phila Pa 19120 TELEPHONE (OFFICE) Mother - 427 1846

URANCE ME USHC POLICY WDG46010 GROUP

E-CERTIFICATION QUIRED ☑ YES ☐ NO DATE OBTAINED 12/8/94 AUTHORIZATION NUMBER 5418089 SECOND OPINION REQUIRED ☐ YES ☒ NO LENGTH OF STAY

IMARY GNOSIS Voluntary Sharnette sterilization

RGICAL/ DICAL PROCEDURE laparoscopic tubal ligation

MITTING YSICIAN Neil E Sloane, MD

REQUIRED DIAGNOSTIC TESTS

ORATORY: ☐ HEMOGLOBIN AND HEMATOCRIT (HH) ☐ BUN (BUN) ☐ GLUCOSE (GLU) ☐ SGOT (SGOT)

OLOGY: ☐ CHEST (CXR)

DIOLOGY: ☐ EKG (EKG)

OTHER TESTS

ORATORY: (LAB)	TO BE COMPLETED TGHMC	TO BE COMPLETED PRIMARY OFFICE	RESULTS RECEIVED DATE
TROLYTES PROFILE (LYTE)	☐	☐	☐
OING TIME (BT)	☐	☐	☐
LOGY (RPR)	☐	☐	☐
LYSIS (UA)	☐	☐	☐
HOSPHATASE (AP)	☐	☐	☐
RIAL BLOOD GAS (ABG)	☐	☐	☐
ANA)	☐	☐	☐
TININE (CREA)	☐	☐	☐
OSE TOLERANCE HOUR (2HGTT)*	☐	☐	☐
MATOID FACTOR (RF)	☐	☐	☐
PTAKE (T3)	☐	☐	☐
4)	☐	☐	☐
')	☐	☐	☐
TSH)	☐	☐	☐
ER PHENYTOIN LEVELS ☑	☐	☐	☐
PHENOBARBITAL LEVELS ✓			

BLOOD BANK: (BBK)	TO BE COMPLETED TGHMC	TO BE COMPLETED PRIMARY OFFICE	RESULTS RECEIVED DATE
TYPE & SCREEN (TS)	☐	☐	☐
CROSS MATCH FOR _____ UNITS OF BLOOD	☐	☐	☐
OTHER _____	☐	☐	☐
CHEMISTRY PROFILE: (LAB)			
CHEM 1 (CH1)	☐	☐	☐
CHEM 5 (CH5)	☐	☐	☐
CHEM 8 (CH8)	☐	☐	☐
OTHER BHCG	☑ ✓	☐	☐
HEMATOLOGY/COAGULATION: LAB			
CBC (CBC)	☐	☐	☐
CBC with DIFF (CBCD)	☑ ✓	☐	☐
ERYTHROCYTE SEDIMENTATION RATE (ESR)	☐	☐	☐
PLT & RETIC (PR)	☐	☐	☐
PROTHROMBIN (PT)	☑ ✓	☐	☐
PARTIAL THROMBOPLASTIN TIME ACTIVATED (APTT)	☐ ✓	☐	☐
OTHER _____	☐	☐	☐

CIAL INFORMATION:

21 10/93

MEDICAL RECORDS COPY

EN-CREST SERVICES
ential Services. One Plymouth Meeting. Suite 200. Plymouth Meeting. PA 19462. (215) 825-9360

MEDICAL VISITS

To be filled out prior to visit:

Date: 12/30/94

Resident: Cynthia Sue

Staff: mother

Doctor: Dr Stone Phone No.: 848-5500

Reason for visit: elective sterilization
(tubal ligation)

Questions for the doctor:

1.

2.

3.

Diagnosis/Condition: elective sterilization

____ Chronic ____ Acute ____ One-time ____ Resolved

Treatment/Approaches (Please specify all):
tubal ligation - laparoscopy

Medications prescribed? Yes X No ___

Follow-up needed? Yes ___ No ___

Special Instructions:
RTO - 4 wks for sup

Doctor's Signature MD

Date 12/30/94

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Response to Guardian's Suggestion of Mootness and Request for Vacatur by postage prepaid as follows:

Loralyn McKinley, Esquire
Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, Pa. 19102

Matthew M. Strickler, Esquire
Leslie H. Smith, Esquire
1745 Market Street
Philadelphia, Pa. 19102

Marta Engdahl

Marta Engdahl

P. O. Box 6994
Charlottesville, Virginia
22906

2/8/95